Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CITY OF LAS VEGAS, et al.,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF NEVADA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Disputing *Hotel Employees & Restaurant Employees Union v. City of New York Department of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002), the Ninth Circuit struck down the City of Las Vegas' ordinances which restricted speech activities in a commercial and entertainment mall that was built on a converted public street as part of a downtown redevelopment project. The Ninth Circuit held that the property's "primary purpose" was "irrelevant" to a public forum status under the First Amendment. When a public street is converted to commercial and entertainment use, does it continue to be a traditional public forum?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners

The Petitioners are City of Las Vegas, Jan Laverty Jones, Fremont Street Limited Liability Corp., and Mark Paris.

None of Petitioners is a subsidiary corporation nor are there are any publicly-held companies owning 10% or more of a Petitioner's stock.

Respondents

The Respondents are American Civil Liberties Union of Nevada, Paul R. Brown, Greg Gable, Gary Peck, Shundahai Network, and Unitarian Universalist Social Justice Committee.

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The July 2, 2003, Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 333 F.3d 1092 (9th Cir. 2003) and is reprinted at App. 3a-37a. The February 4, 1999, Ninth Circuit Order is unreported and is reprinted at App. 68a-72a. The April 4, 2001, Order of the United States District Court for the District of Nevada is unreported and is reprinted at App. 42a-67a. The April 24, 1998, Order of the district court is reported at 13 F. Supp.2d 1064 (D. Nev. 1998) and is reprinted at App. 73a-115a.

STATEMENT OF JURISDICTION

The Ninth Circuit denied *en banc* rehearing of its opinion on August 12, 2003. This Petition for Certiorari is timely filed within ninety (90) days of August 12, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . ." Through the Fourteenth Amendment, the First Amendment applies to the states and their local governments. Relevant portions of the Las Vegas Municipal Code are:

> **11.68.100 Prohibited**. The following are prohibited with the Pedestrian Mall:
>
> (A) Animals unless used in connection with a mall activity authorized by The Fremont Street Experience

Limited Liability Company or used for the purpose of assisting the visually or aurally impaired;

(B) Mall vending, mall advertising, mall entertainment special events or other commercial activities unless conducted or authorized by The Fremont Street Experience Limited Liability Company;

(C) Parades;

(D) Unicycles, bicycles and other types of cycles, skateboards, roller skates, in-line skates and shopping carts except as authorized by The Fremont Street Experience Limited Liability Company in connection with special events and mall entertainment;

(E) Sleeping or camping;

(F) Littering;

* * *

(H) The placement of any table, rack, chair, box, cloth, stand, booth, container, structure or other object within the Pedestrian Mall except as necessary for emergency purposes, or the maintenance or repair of the Pedestrian Mall, or as authorized by The Fremont Street Experience Limited Liability Company for special events, mall advertising, mall entertainment or mall vending or other commercial and entertainment activities;

(I) In-person distribution to passersby in a continuous or repetitive manner of any physical or tangible things and printed, written or graphic materials;

* * *

(App. 142a-143a).

10.44.030 Solicitation at certain locations — Misdemeanor. Any individual who personally engages in solicitation at any of the following places shall be guilty of a misdemeanor;

* * *

(F) Within the area designated as a pedestrian mall in Ordinance 3747, in accordance with NRS 268.810 et seq.

(App. 149a).

STATEMENT OF THE CASE

I. OVERVIEW

The Ninth Circuit reversed the district court's summary judgment order, which had found The Fremont Street Experience Mall (the "Mall") to be a non-public forum. The Ninth Circuit held that as an open-air plaza, built upon a former public street, the Mall is a traditional public forum as a matter of law. In doing so, the Ninth Circuit acknowledged its conflict with the Second Circuit's decision in *Hotel Employees & Restaurant Employees Union v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002).

II. BACKGROUND

The Mall opened for business in December 1995 to serve as an economic catalyst for a declining urban area.[1] Before the Mall's creation, the City's core business district was in severe economic decline, with its principal employers losing millions of dollars annually. Central to this decline was the area's dependence upon tourism. However, tourists were disappearing because the area was perceived as unsafe, unclean and unsophisticated, especially when compared to the newly-built megaresorts lining the famed Las Vegas Strip. (App. 5a).

To revive this urban area, the City recognized the need to create its own tourist attraction, one that could draw tourists from the Strip. After much study, the City chose to eliminate a five-block stretch of what was formerly Fremont Street and parts of its former First, Third and Fourth Streets as well as Casino Center Boulevard, for creation of the Mall. (App. 75a).

Construction began in 1994 with the closure, demolition and excavation of these streets. Thereafter, during the year-long construction, more than $70 million was expended to build the Mall. (App. 6a). After the existing streets and sidewalks were demolished, holes were dug to build columns for the ten-story tall celestial superstructure which spans over

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[1] For construction and operation of the Mall, the City entered into a management agreement with the Mall's private operator, The Fremont Street Experience Limited Liability Company.

most of the Mall.[2] This superstructure is the Mall's centerpiece, extending over 1,300 feet in length. This superstructure contains approximately 1.8 million lights which are computer operated to generate an animated show when combined with the sound system of the over 200 speakers located throughout the complex. In other words, this ten-story tall superstructure operates as what is believed to be the world's largest video screen or television. Additionally, the Mall installed specialized utilities, irrigation and cooling systems to control the Mall's environment. (App. 74a). Finally, after a 50-foot wide strip of special high strength concrete was poured over the area, it was coated, stained and formed into a patterned design to guide pedestrian traffic flows. Like the flooring in any mall, it is cleaned daily.

To fulfill its role as a central tourist attraction, the Mall provides daily entertainment like circus acts, strolling "Las Vegas" showgirls and live bands, to name a few. The Mall also hosts numerous special events throughout the year, ranging in size from as small as 7,500 people to as large as 45,000 or more people, which can include closing the Mall to the public. The cost of one such special event can exceed one half-million dollars.

The Mall is designed to operate as a self-sufficient enterprise. Thus, it must generate revenue sufficient to cover its $6 to $10 million annual operating costs, including paying property tax on the entire facility. (App. 74a). To do this, it licenses space throughout the Mall to various retail vendors. Each day, from morning until late night, there are

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[2] A picture being worth a thousand words, attached at the end of the Appendix are pictures which were part of the record below showing the Mall's construction and use.

approximately 28 retail operators spread throughout the Mall selling various goods and services. The Mall also licensed three large retail kiosks to Coca-Cola and Fuji Films, the Mall's original corporate sponsors.

To protect this investment and preserve the Mall for its intended entertainment and commercial uses, the City enacted ordinances that restrict solicitation, handbilling and other activities that would disrupt the Mall. The City did so based upon public hearings where it was shown that allowing such activities would put the Mall in economic jeopardy. The City was presented with testimony of numerous witnesses, written surveys, studies and other documentation showing that speech activities within the Mall would disrupt its environment, in turn causing visitors, tenants and corporate sponsors to go elsewhere or even deter them from coming to the Mall in the first instance. (App. 104a).

Because of its large number of pedestrian tourists, the metropolitan area generally known as Las Vegas has a history of problems with in-person solicitation and other activities, especially commercial solicitation by adult businesses in areas where tourists congregate.[3] The City and the Mall's management realized that if solicitation and other activities occurred within the Mall, retailers would not agree to rent space. It is common sense that retailers are not going to pay for the right to do business in an enterprise where their potential customers can be solicited by other businesses or persons.

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[3] *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, (9th Cir. 1998). *See also Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir. 1996) (explaining that commercial solicitation is a problem in tourist city of Key West).

Similarly, the City and the Mall's management realized that speech activities would disrupt the Mall's attractions, principally its light and sound show and its daily entertainment and special events. The purpose of these attractions, especially the superstructure, is to draw and hold the customer's attention on the sights and sounds. That purpose is defeated if solicitors, distributors and purveyors of speech are granted access to work the crowd. Opening the Mall to such activity is no different than allowing handbillers and solicitors to approach theater patrons during the show. In the end, if the Mall's environment were not controlled, tourists would not attend and retailers would not pay rent for space, which means that the Mall would ultimately fail to generate revenues to cover its expenses. (App. 104a).

III. PROCEEDINGS BELOW

Two years after the Mall opened for business, the ACLU and others challenged the City's ordinances on First Amendment grounds. The City responded to the complaint with a motion for summary judgment, contending that the Mall is a non-public forum. The ACLU opposed summary judgment and requested a preliminary injunction, insisting that discovery was needed as it disputed the Mall's forum status.

The district court generally agreed with the City and entered partial summary judgment, finding that the Mall is a non-public forum. It explained that the Mall's special uses and purpose, coupled with its design and features, gave the public notice that the Mall was a special enclave devoted to a particular purpose, not the type of open public property that is a traditional public forum. (App. 96a). The court explained that the property's physical character and use had been changed at great expense which "clearly distinguish it from surrounding streets and sidewalks." (App. 95a).

For the most part, the district court upheld the City's ordinances, finding them reasonable to preserve the Mall's intended purpose. Specifically, the district court noted that the City's interests in preserving the Mall's uses were even more significant than that for airports, which are recognized as non-public forums, because the Mall's environment is itself an attraction, and one that "must attract visitors in order to compete with numerous other shopping entertainment venues in Las Vegas." (App. 104a).

The district court did, however, find that two of the City's ordinances — the restrictions on handbilling and the sale of merchandise within the Mall — were invalid for reasons unrelated to the Mall's non-public forum status. Thus, it entered a preliminary injunction as to those two ordinances and denied any other relief.

Both sides appealed the preliminary injunction rulings. A panel of the Ninth Circuit affirmed the district court, concluding that it had not abused its discretion in any regard. (App. 68a-72a). About two years later, the district court, noting the ACLU's failure to further prosecute the action, entered final judgment that essentially paralleled its earlier ruling: It made the limited preliminary injunction against the two ordinances permanent and denied the other relief sought by the ACLU. (App. 42a-67a).

In the ACLU's appeal of that ruling, a different Ninth Circuit panel came to the opposite result and held that the district court erred in almost every respect. Despite the ACLU's arguments about disputed facts and the need for discovery, this panel held that the Mall unmistakably possesses the characteristics of a traditional public forum, claiming that the First Amendment "must deal with new problems in a changing world." (App. 5a).

According to this panel, while "governmental attempts to control speech are far from novel, they have new potency in light of societal changes and trends toward privatization." (App. 11a). With that, the Ninth Circuit broadly proclaimed that "[a]wareness of contemporary threats to speech" — the alleged privatization of public spaces and population movement to the suburbs — "must inform our jurisprudence regarding public forums." (App. 12a).

The Ninth Circuit characterized the public forum analysis under the First Amendment as a hopeless muddle, writing that the "courts consider a jumble of overlapping of factors, frequently deeming a factor dispositive or ignoring it without reasoned explanation." (App. 17a). It also suggested that there is wide divergence about the goals and proper application of this Court's forum analysis. *Id.*

The Ninth Circuit ultimately focused upon the fact that the Mall was constructed upon what was formerly a public street, and the fact that it was dissected by two streets, located in a central business district. The Ninth Circuit recognized that the transformation of the property distinguished it from just another street. (App. 22a). However, according to the Ninth Circuit, the property still served as a type of a public thoroughfare because of its location and absence of physical barriers to prohibit the public from walking through it. *Id.*

In that regard, it openly disputed the Second Circuit's analysis in *Hotel Employees' & Restaurant Employees' Union*, 311 F.3d 534, which explained that the property's "primary function and purpose" should control, not whether some members of the public might be invited to traverse the property as a thoroughfare. Indeed, to reject the Second Circuit's view, the Ninth Circuit broadly asserted "[t]he fact that the *primary* use of the property is not as a park or public

thoroughfare is *irrelevant* as long as there is no concrete evidence that use for expressive activity would significantly disrupt the principal uses." (App. 21a) (emphasis original). With its broad ruling, the Ninth Circuit reversed almost every aspect of the district court's opinion.

On August 12, 2003, the City's motion for *en banc* rehearing was denied, without dissent. (App. 1a-2a). However, the Ninth Circuit subsequently stayed its mandate pending the filing of this Petition for Writ of Certiorari. (App. 38a-39a).

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the conflict between the lower courts on the correct manner of public forum analysis for public property converted to commercial uses. The Ninth Circuit's ruling significantly and improperly constrains the ability of local governments to undertake redevelopment projects designed to relieve blighted areas.

I. REVIEW IS PROPER BECAUSE THE NINTH CIRCUIT IS IN CONFLICT WITH THIS COURT'S JURISPRUDENCE AND THAT OF OTHER CIRCUITS

This Court's jurisprudence has been careful to define the class of property that is a traditional public forum, recognizing that the government, like a private property owner, has "the power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985). The Court has long rejected the argument that any time publicly-owned property is open to the public, it thereby serves as a public forum for speech. *Greer v.*

Spock, 424 U.S. 828, 836 (1976). Rather, this Court has announced a forum analysis that dictates when and how the government may restrict expressive activity upon its property. *International Soc'y. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).

In *Lee*, the Court endorsed and employed an "historical" approach, explaining that public property serving as a traditional street, sidewalk or park is the type of property that is a traditional public forum. 505 U.S. at 680. These are areas held, by tradition and history, in trust for expressive use. *See Hague v. CIO*, 307 U.S. 496, 515 (1939) ("Streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public question.") Under this analysis, modern creations, like airport terminals, do not qualify as traditional public fora, even though they are generally open to the public. *Lee*, 505 U.S. at 680. As the Court has subsequently emphasized, it "has rejected the view that traditional public forum status extends beyond its ***historic confines*** . . . ." *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 678 (1998) (emphasis added).[4]

Because the category is limited, the lower courts have recognized that modern creations, even if open to the public and having attributes like sidewalks, streets or parks, are still not traditional public forums. *See Chicago ACORN, S.E.I.U. v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir. 1998) (former Navy Pier, which was renovated into a meeting center, with sidewalks, parks, and even a street, is

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[4] The Ninth Circuit labels this statement as "dicta." (App. 15a, n.6).

not a traditional public forum); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1203 (11th Cir. 1991) (interstate rest areas, although consisting of sidewalks, streets and picnic areas, are modern creations and not traditional public fora).[5]

However, the Ninth Circuit now asserts that the Court's forum analysis is so confusing and divergent that there is no "widespread agreement upon how to determine the nature of a forum" and no clear test defining when a traditional public forum exists. (App. 16a). With that and its view that "contemporary threats to speech must inform our jurisprudence" (App. 12a), the Ninth Circuit rejected the view that the City could change the property's primary use and treat the property as a non-public forum.

A. The Ninth Circuit is in direct conflict with the Second Circuit about the permissible uses of public property and how to define a public forum.

The Ninth Circuit's analysis squarely conflicts with the Second Circuit's decision in *Hotel Employees' & Restaurant Employees' Union v. City of New York, Department of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002). At issue there was the Josie Robertson Plaza. The Second Circuit described that Plaza as:

> [A]n open square situated at the center of several performing arts buildings in the Lincoln Center complex . . . . The Plaza opens east onto Columbus Avenue and is reached by climbing a flight of stairs.

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[5] At least until now, the Ninth Circuit had followed the Eleventh Circuit's lead on the issue of interstate rest areas. *Jacobson v. Bonine*, 123 F.3d 1272, 1273-74 (9th Cir. 1987).

> The Plaza can also be accessed by pedestrian walkways that lead from the surrounding streets past the arts building.

Id. at 549.

Probably more so than the Mall at issue here, the Plaza possessed the physical characteristics of a traditional public forum. However, the Second Circuit explained that the physical characteristics of publicly-owned property is not the issue. What matters is the "primary function and purpose" of the property. *Id.* at 550. The Second Circuit recognized that the property's primary function and purpose is what determines an average visitor's expectations about the property's status. Importantly, while the Plaza was open and invited people to use it to stroll through or even across (*i.e.*, serving as a public thoroughfare), that use was secondary or incidental to the property's primary function. *Id.* Thus, the Second Circuit held that the Plaza was not a traditional public forum.

The Ninth Circuit openly rejects the Second Circuit's analysis, criticizing its focus upon a property's "primary" purpose or function. (App. 20a-21a). The Ninth Circuit appears to concede that the primary purpose and function of the property upon which the Mall was built has been changed. *Id.* at 24a ("There is no doubt that the decorative payment, barriers to cars, and canopy indicate to the public that The Fremont Street Experience is not simply another street . . . ."). However, according to the Ninth Circuit, this change is "irrelevant" because the property's "primary" use and function does not decide the question. *Id.* at 21a.

The Ninth Circuit's criticism and conflict with the Second Circuit's analysis on such a central point of constitutional law

does not square with this Court's jurisprudence. This Court routinely focuses upon a property's primary purpose and function in determining its forum status. In *Lee*, 505 U.S. at 682, the Court focused upon the "principal purpose" of airport terminals as being that of providing services attractive to the marketplace, not being a place intended for discourse. In *Cornelius*, 473 U.S. at 800-804, the Court explained that "the principal purpose" of a traditional public forum is free exchange of ideas and that if the "principal function" of public property is that of a commercial enterprise, speech would disrupt that principal use. Likewise, in *Greer*, 424 U.S. at 838, the Court focused upon "basic function" of a military installation in deciding that it was not a public forum.

The Ninth Circuit's contention — that focusing upon the primary use and purpose of public property would result in "*no* traditional public forums" — only serves to highlight the conflict it creates. (App. 21a) (emphasis original). Obviously, this Court's focus and that of other circuits upon a property's principal or primary purpose has not resulted in "no" traditional public forums. To the contrary, Justice Kennedy, who criticized this Court's narrow definition of the traditional public forum category in *Lee*, agrees that the government can change the principal use of its property to eliminate a traditional public forum:

> In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, ***or changing its principal use***. Otherwise the State would be prohibited from closing a park, or eliminating a street

> or sidewalk, which no one has understood the public forum doctrine to require.

Lee, 505 U.S. at 699-700 (Kennedy, J., concurring)(emphasis added).

The conflict between the Ninth and Second Circuits about how to analyze and define such a central point of First Amendment law warrants this Court's review. Under the Ninth Circuit's analysis, any public facility that is built in such a way as to permit the public to stroll upon or pass through it, thereby becomes a traditional public forum, even if its primary use and function is as something other than a public thoroughfare or park. Such an approach poses far-reaching consequences for large amounts of publicly-owned property.

B. The Ninth Circuit's approach unduly interferes with governmental discretion about how to best use publicly-owned property for commercial and entertainment purposes.

In its disagreement with the Second Circuit, the Ninth Circuit broadly asserted that the primary use of property is irrelevant unless there is "concrete evidence" that speech would "significantly" disrupt the property's principal uses. (App. 21a). This assertion leads public forum analysis into an uncharted evidentiary wilderness and will unnecessarily prevent local governments from building innovative redevelopment projects. Indeed, with that burden, all types of publicly-owned facilities are subject to being opened for speech.

The burden that the Ninth Circuit hoists upon the government has no support. This Court has expressly refused

to require proof of "past disturbances" or that "future disturbances would be likely" to show that speech "may disrupt the property's intended function." *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 52 n.12 (1983). Likewise, in *Lee*, there is no hint that the government presented concrete evidence that speech would significantly disrupt an airport's operations. Instead, as Justice O'Connor explained in her swing vote in *Lee*, the government's burden generally is satisfied by presenting "some explanation as to why certain speech is inconsistent with the intended use of the forum." *Lee*, 505 U.S. 691-92 (O'Connor, J. concurring). The Ninth Circuit has essentially put the cart before the horse: It purports to define the nature of the forum by the government's ability to prove a need to exclude speech, as opposed to defining the government's burden after determining the nature of the forum.

The Ninth Circuit also fails to properly account for this Court's recognition of the government's right to exert control when it acts as the proprietor of a commercial operation, as it is doing here with the Mall, which must be operated in a manner to generate revenue to meet its expenses. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974); *Cornelius*, 473 U.S. at 804; *see also General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 279 (2d Cir. 1997) ("The Supreme Court has recognized that the government's dedication of property to a commercial enterprise is inconsistent with an intent to [create] a public forum.").

The failure of the Ninth Circuit's analysis to recognize the government's rights to control its property is shown by its citation to *United States v. Grace*, 461 U.S. 171, 180 (1983), which stands for the proposition that the government cannot by its own "ipse dixit" change the status of publicly-owned

property. *Grace* involved traditional public sidewalks that had no special purpose or use, and there was nothing to alert the public that "they have entered some special type of enclave." *Id.* at 180.

Of course, the contrary is true here. The City did not merely decree that the property was off limits to speech. The City and its private partners altered the physical character and principal uses of the property, at a price tag of over $70 million. On top of that, the Mall expends between $6 million and $10 million annually to provide its various attractions and forms of entertainment. Again, the Mall hosts the world's largest video screen, provides daily entertainment attractions, a special surface, landscaping and numerous retail vendors. The City did not "ipse dixit" change its status.

While it may be located upon a former street and is crossed by streets in two areas, the dramatic physical changes and altered use of the property "all provide notice to visitors that they have entered a special enclave which is separate and distinct from the surrounding public forum areas." (App. 96a). Indeed, the Ninth Circuit did not dispute that the Mall was distinguished. It said only that "[a]lthough there is no doubt that the decorative pavement, barriers to cars, and canopy indicate to the public that The Fremont Street Experience is not simply another street, its openness to the public and smooth integration into the downtown preserve its public forum status." (App. 24a).

The Ninth Circuit has essentially substituted its judgment for that of local officials about what property is best to use for redevelopment purposes and how that property should be constructed. Unable to deny that the City has the power to eliminate a public forum, the Ninth Circuit nevertheless claims that the City's more than $70 million transformation

here is just not enough. Respectfully, a sensible public forum jurisprudence should preserve for governmental decision makers when, where, and how local governments build the commercial and entertainment enterprise. So long as the government constructs and operates its property in a manner that tells the public of the property's special use and nature, which the City plainly did here, the public forum doctrine should preserve to the government the right to decide upon which particular parcel of publicly-owned property such enterprise is to be built, even if it is on a former street.

C. The Ninth Circuit's justification for its expansive public forum jurisprudence is erroneous in both theory and practice.

Laced throughout the Ninth Circuit's opinion is broad rhetoric about how First Amendment freedoms are being squeezed "in light of societal changes and trends toward privatization." (App. 11a). According to the Ninth Circuit, the movement of populations to the suburbs constitutes a threat to speech that requires a vigorous public forum jurisprudence to firmly preserve any that currently exists. (App. 11a-12a).[6] However, if these are real threats to speech,

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[6] The Ninth Circuit's philosophical discussion about migration to the suburbs and contemporary threats to speech bears an uncanny resemblance in substance and tone to *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), which held that privately-owned shopping malls are public forums. Of course, the rationale of *Logan Valley* was repudiated in *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976). The advent of the suburban shopping mall did not eliminate areas for free speech. Nor will the First Amendment cease to be an effective force if the government's discretion to create facilities like the Mall is preserved.

the Ninth Circuit's approach will not combat them, it likely will make matters worse.

Presumably, if people are fleeing urban areas for the suburbs, it is because these older areas are in decay. One way that state and local governments seek to combat such decay and entice the public back to the inner city is through redevelopment projects. Obviously, the type of redevelopment undertaken depends upon the type of resources and property available for governmental use. Some cities build, for example, sports arenas in older business districts as a catalyst to spur economic development. Here, the City chose to build the Mall because, in its view, that is the most effective use of the publicly-owned property that was available. Creating an economic catalyst that brings the public back to the decaying inner city does not reduce the prospects for speech, it increases those prospects.

The potential for an expansive public forum doctrine to interfere with urban redevelopment was noted by Judge Posner in *Chicago ACORN*, 150 F.3d at 704. At issue there was the old Chicago Pier which the city had renovated, giving it many physical attributes of a traditional public forum. It had a street known as "Dock Street" and it consisted of parks, sidewalks and other open areas. However, Judge Posner explained that the Pier was not a traditional public forum. Of note was his cautionary discussion that an expansion of the types of property that are deemed to be traditional public fora could, in the long run, reduce protections for speech. Specifically, he noted that if the First Amendment "handcuffs the effective exploitation of commercially-valuable public property, the government will have an incentive to sell it to a private company, who will not be cabined by the First Amendment." *Id.* at 704.

Here, the Ninth Circuit's proposed expansion of the public forum doctrine not only needlessly interferes with the discretion of elected officials about how to best use the public's property for redevelopment, it will also encourage full privatization of public space, not prohibit it. Under the Ninth Circuit's decision, the City's incentive is to sell the property in full to its private manager, have the private manager erect a fence around it, charge an admission fee, and be unrestrained by even the "reasonableness" standard that applies to non-public forums. Thus, while the Ninth Circuit can claim today that it opened a few thousand feet of property for full expressive activity, its ruling, which may effectively kill this redevelopment project, will with time reduce the prospects for expressive activity in this and other older urban areas.

CONCLUSION

The Petition for Writ of Certiorari should be granted. The Ninth Circuit's decision expands the concept of traditional public fora well beyond its historic boundaries. It directly conflicts with the Second Circuit's analysis on the same issue, and it unnecessarily interferes with the decisions of state and local officials about which property to use for commercial and entertainment purposes and how to best use the property for such purposes. This Court should grant the petition, reverse the Ninth Circuit and clarify this area of the law for the lower courts.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 01-15958

[Filed August 12, 2003]

AMERICAN CIVIL LIBERTIES UNION OF NEVADA; et al.,
Plaintiffs-Appellants,

v.

CITY OF LAS VEGAS; et al.,
Defendants-Appellees.

AMERICAN CIVIL LIBERTIES UNION OF NEVADA; et al.,
Plaintiffs-Appellees,

v.

CITY OF LAS VEGAS; et al.,
Defendants-Appellants.

Before: TASHIMA, THOMAS, and PAEZ, Circuit Judges.

ORDER

The petition for panel rehearing is DENIED. The full court has been advised of the petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Therefore the petition for rehearing en banc is DENIED. Fed. R. App. P. 35(b).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-15958, No. 01-15966

[Filed July 2, 2003]

AMERICAN CIVIL LIBERTIES UNION OF NEVADA; PAUL R. BROWN; GREG GABLE; GARY PECK; SHUNDAHAI NETWORK; UNITARIAN UNIVERSALIST SOCIAL JUSTICE COMMITTEE,
Plaintiffs-Appellants,

v.

CITY OF LAS VEGAS; JAN LAVERTY JONES; FREMONT STREET LIMITED LIABILITY CORP.; MARK PARIS,
Defendants-Appellees.

AMERICAN CIVIL LIBERTIES UNION OF NEVADA; PAUL R. BROWN; GREG GABLE; GARY PECK; SHUNDAHAI NETWORK; UNITARIAN UNIVERSALIST SOCIAL JUSTICE COMMITTEE,
Plaintiffs-Appellees,

v.)
)
CITY OF LAS VEGAS;)
JAN LAVERTY JONES;)
FREMONT STREET LIMITED)
LIABILITY CORP.; MARK PARIS,)
Defendants-Appellants.)
)

Appeal from the United States District Court
for the District of Nevada
D.C. No. CV-97-01419-DWH
D.C. No. CV-97-01419-DWH
David Warner Hagen, District Judge, Presiding

JUDGES: Before: A. Wallace Tashima, Sidney R. Thomas, and Richard A. Paez, Circuit Judges

OPINION

PAEZ, Circuit Judge:

In a successful bid to revive its decaying downtown, the City of Las Vegas followed the lead of towns across the United States and turned several blocks of its main downtown street into a publicly-owned pedestrian mall, the Fremont Street Experience. Fearful of the potential for disruption of merchants and customers, the City placed significant restrictions upon First Amendment activities in the Fremont Street Experience. After running afoul of these restrictions, the American Civil Liberties Union of Nevada ("ACLU") and others (jointly "the Plaintiffs") brought this 42 U.S.C. § 1983 civil rights suit. The Plaintiffs appeal the district court's determination that the mall is a nonpublic forum, and its

ruling that City ordinances restricting soliciting and tabling were constitutional. The City of Las Vegas cross-appeals the district court's determination that City ordinances limiting leafleting and vending were unconstitutional.

We affirm in part, reverse in part, and remand. Because the Fremont Street Experience unmistakably possesses the characteristics of a traditional public forum, we reverse the district court's conclusion that it is a nonpublic forum. Recognizing that "the First Amendment . . . must deal with new problems in a changing world," *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 566 (9th Cir. 1984) (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 885, 73 L. Ed. 2d 435, 102 S. Ct. 2799 (1982)), we hold that the Fremont Street Experience is a public forum. As a consequence, the restrictions on First Amendment activities must be scrutinized under a strict standard of review in order to protect adequately the right to expression. Because the City ordinances restricting leafleting and vending message-bearing materials fail even under the lesser standard applied by the district court, we affirm the district court's conclusion that they are unconstitutional. We remand to allow the district court to examine the other ordinances in question under the proper standard of review.

I.

In the early 1990s, downtown Las Vegas was suffering from an economic downturn. The area was seen as sleazy and unsafe, and downtown casinos were unable to compete with the glitzy Las Vegas Strip. Moreover, key economic factors showed that the area was in decline. In an effort to halt the slump and return downtown to its former luster, city officials

decided to emulate economic revival measures taken in towns throughout the United States by creating a pedestrian-friendly zone. Five blocks of Fremont Street, the center of the downtown area, were closed off to automotive traffic. The City of Las Vegas contracted with a private entity, the Fremont Street Experience Limited Liability Corporation ("FSELLC"), to transform frumpy Fremont Street into the glamorous Fremont Street Experience. At a cost to the public and contributing Fremont Street businesses of $ 70 million, the street and sidewalk were torn up, various underground infrastructure elements were installed, the street was decoratively repaved as one large promenade, and a canopy capable of generating a lightshow (known, with a dash of hyperbole, as the "celestial superstructure") was placed high overhead certain parts of the street.

The street continues to play its old role as a pedestrian thoroughfare, and at two points it is crossed by streets bearing car traffic. It also functions as a "commercial and entertainment complex," intended to be an "attraction to compete with numerous other entertainment venues in Las Vegas." In addition to the many casinos and stores that line the street, the Fremont Street Experience hosts daily performing acts and bands, and frequently holds large special events, most of which are free and open to the public. In the evening, the lightshow plays overhead for a few minutes each hour.

Concerned with providing an environment in which shoppers could sample the delights of the Fremont Street Experience without interruption or molestation, one which could compete with private malls and entertainment centers, the City prohibited various types of activity in the Fremont

Street Experience. Section 10.44 of the Las Vegas Municipal Code (LVMC) prohibits any form of solicitation in the Fremont Street Experience,[1] and sections 11.68.100(I), (B), and (H) respectively prohibit leafleting, unauthorized vending, and the unauthorized erection of structures.[2] There are no specific prohibitions against picketing and demonstrations, although these may be restricted by general

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[1] Solicitation in the Fremont Street Experience is regulated by a provision of the Las Vegas Municipal Code that reads: "Solicitation at certain locations -- Misdemeanor. Any individual who personally engages in solicitation at any of the following places shall be guilty of a misdemeanor: . . . (F) Within the area designated as a pedestrian mail [sic]." LVMC § 10.44.030.

[2] The relevant portion of the Pedestrian Mall Act reads:

> Prohibited. The following are prohibited within the Pedestrian Mall: . . .
>
> (B) Mall vending, mall advertising, mall entertainment special events or other commercial activities unless conducted or authorized by The Fremont Street Experience Limited Liability Company; . . .
>
> (H) The placement of any table, rack, chair, box, cloth, stand, booth, container, structure, or other object within the Pedestrian Mall except as necessary for emergency purposes, or the maintenance or repair of the Pedestrian Mall, or as authorized by The Fremont Street Experience Limited Liability Company for special events, mall advertising, mall entertainment or mall vending or other commercial and entertainment activities;
>
> (I) In-person distribution to passersby in a continuous or repetitive manner of any physical or tangible things and printed, written or graphic materials . . . .

LVMC § 11.68.100.

prohibitions against obstructive conduct. LVMC § 10.47.010.

The Fremont Street Experience was completed in 1995. In August 1997, during a small rally held by the ACLU of Nevada on the Fremont Street Experience to protest restrictions on free speech activities, local police ordered the assembled individuals to disperse. Some time later, the ACLU of Nevada, the Shundahai Network, the Unitarian Universalist Social Justice Committee, and Paul R. Brown, Greg Gable, and Gary Peck, individual members of these groups, filed this lawsuit against the City and FSELLC, as well as against Jan Laverty Jones, former mayor of Las Vegas, and Mark Paris, Executive Director of FSELLC, in their official capacities (collectively "the City" or "Defendants"). The complaint alleged that FSELLC had "adopted policies prohibiting traditional First Amendment activity on the Fremont Street Experience, such as proselytizing, charitable soliciting, distributing literature, circulating petitions and collecting signatures, picketing, and giving away or selling message-bearing merchandise," and sought an injunction and a declaration that the restrictions were unconstitutional both facially and as applied.

The City responded with a motion to dismiss the complaint or, alternatively, for summary judgment. The Plaintiffs sought a preliminary injunction enjoining enforcement of the challenged ordinances. On April 24, 1998, the district court issued a memorandum order declaring that the Fremont Street Experience was a nonpublic forum. *ACLU v. City of Las Vegas (ACLU v. City of Las Vegas)*, 13 F. Supp. 2d 1064 at 1068 (D. Nev. 1998). The basis for this determination was the fact that the City had created the Fremont Street Experience for the principal purpose of

stimulating economic growth, not for the purpose of promoting expression; that great expense had been incurred in the transformation; and that the textured pavement and canopy distinguished the Fremont Street Experience from surrounding streets and sidewalks. *Id.* at 1076-1077.

As part of the same order, the district court granted summary judgment for Defendants on the solicitation and tabling ordinances, but concluded that even under the less rigorous standard of scrutiny applied to nonpublic forums, the leafleting and vending ordinances were likely unconstitutional. Thus, the court granted the Plaintiffs a preliminary injunction against these provisions. Each side appealed, and a panel of the Ninth Circuit dismissed the appeals in an unpublished disposition, holding that the district court did not abuse its discretion in granting the preliminary injunction. *ACLU v. City of Las Vegas*, 1999 U.S. App. LEXIS 1674, 1999 WL 65130 (9th Cir. 1999). The district court issued its final order on April 4, 2001, reaffirming its determination that the Fremont Street Experience was a non-public forum, and granting summary judgment for the City with regard to the Plaintiffs's challenge to the solicitation and tabling ordinances and their request for an injunction against interference with protected activities. However, the district court granted summary judgment for the Plaintiffs regarding the challenge to the leafleting and vending ordinances, and made the preliminary injunction permanent. Each side timely appealed.

According to the Plaintiffs, on a number of occasions after the district court issued its preliminary injunction, various individuals and groups affiliated with the Plaintiffs were ordered not to leaflet on the Fremont Street Experience and

were able to continue only after vigorous protest. Additionally, on October 24, 2000, three members of [**9] the ACLU of Nevada attempted to set up a table on the Fremont Street Experience in order to pass out literature and collect signatures. FSELLC security guards initially ordered the ACLU to leave, but ultimately permitted the distribution of literature on the condition that the table be removed.

II.

We have jurisdiction pursuant to 18 U.S.C. § 1291. A grant of summary judgment is reviewed *de novo*, *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc), and may be affirmed on any ground supported by the record, *Venetian Casino Resort v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 941 (9th Cir. 2001). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Balint*, 180 F.3d at 1050. In ruling on cross-motions for summary judgment, we evaluate each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1078 (9th Cir. 2001); *Pirkheim v. First Unum Life Ins.*, 229 F.3d 1008 at 1010 (10th Cir. 2000). We review evidentiary rulings made in the context of summary judgment for abuse of discretion. *Block v. City of Los Angeles*, 253 F.3d 410, 416 (9th Cir. 2001). Permanent injunctive relief is also reviewed for an abuse of discretion. *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir. 1999).

III.

We begin by noting that "the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Boos v. Barry*, 485 U.S. 312, 318, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)). Although governmental attempts to control speech are far from novel, they have new potency in light of societal changes and trends toward privatization. *See Chicago ACORN v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 704 (7th Cir. 1998) (expressing concern regarding "what is now a nationwide trend toward the privatization of public property"); *United States Labor Party v. Knox*, 430 F. Supp. 1359, 1361 (W.D. N.C. 1977) (explaining that with the rise of the automobile, "downtown streets have emptied and patronage of [private] suburban shopping centers has swelled," necessitating access to other "publicly owned gathering places of the people"). "A suburbanized society whose public buildings and stores were cordoned off from free speech activities might never hear the first calls of new causes that would otherwise ignite public interest." *Id.* at 1362 (citing example of civil rights movement, which "developed momentum in the streets and in handbills and exhortation"). Like the Tenth Circuit, we recognize that

> "as society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda*, 497 U.S. 720, 737, 111 L. Ed. 2d 571, 110 S. Ct. 3115[ ] (1990) (Kennedy, J., concurring in the judgment). We

> think this is particularly true with respect to downtown public spaces conducive to expressive activities.

First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1131 (10th Cir. 2002) (full citation provided). Awareness of contemporary threats to speech must inform our jurisprudence regarding public forums.

A.

The Supreme Court has constructed an analytical framework known as "forum analysis" for evaluating First Amendment claims relating to speech on government property. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); *see also Cornelius v. NAACP*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Under this approach, we first determine whether the property is a traditional public forum, a designated public forum, or a nonpublic forum in order to ascertain what level of scrutiny to apply to restrictions on speech.[3] *Perry*, 460 U.S. at 45-46. Following this determination, we apply the indicated standard of scrutiny to decide whether the restrictions in question pass constitutional muster. *Id.* Thus, the scope of permissible governmental interference with expressive activity varies depending upon the nature of the location in which speech is

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[3] Our circuit also recognizes a fourth category, the limited public forum, which has no relevance here. *See Hopper v. City of Pasco*, 241 F.3d at 1074-75; *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

to take place. *Id.* at 44. Despite considerable criticism,[4] the Supreme Court has not retreated from its embrace of the forum method of analyzing restrictions on speech. *See Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation (H.E.R.E. v. City of New York)*, 311 F.3d 534, 546 n.8 (2d Cir. 2002).

The ability to restrict speech in public forums, whether traditional public forums or designated public forums, is "sharply circumscribed."[5] *Perry*, 460 U.S. at 45; *see also Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) ("Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales." (quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984)) (alteration omitted)).

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[4] *See, e.g.*, LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 986-97 (2d ed. 1988); Stephen G. Gey, *Reopening the Public Forum -- From Sidewalks to Cyberspace*, 58 OHIO STATE L. J. 1535 (1998); David A. Stoll, *Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine: International Society for Krishna Consciousness, Inc. v. Lee*, 59 BROOK. L. REV. 1271 (1993); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

[5] The First Amendment applies to state and local governments through the Fourteenth Amendment. *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1286 (10th Cir. 1999). Neither party contests the premise that FSELLC is a state actor, and its pervasive entanglement with the City of Las Vegas and performance of an exclusively and traditionally public function support that conclusion. *See Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002).

> In [a public forum], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end . . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Frisby v. Schultz, 487 U.S. 474, 481, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988) (quoting *Perry*, 460 U.S. at 45). In contrast, "if the forum is nonpublic, a more lenient standard applies, and the government may restrict access 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because the public officials oppose the speaker's view.'" *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966 (9th Cir. 2002) (quoting *Cornelius*, 473 U.S. at 800) (second alteration in original); *see also Hale v. DOE*, 806 F.2d 910, 915 (9th Cir. 1986).

The Plaintiffs do not argue that the Fremont Street Experience fits into the category of designated public forum, which is found where the government intentionally opens up a non-public forum to First Amendment activity "for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." *Perry*, 460 U.S. at 46 n.7. Thus, the question before us is whether the Fremont Street Experience is a traditional public forum or a nonpublic forum.

The quintessential traditional public forums are sidewalks, streets, and parks. *United States v. Grace*, 461 U.S.

171, 177, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983) (holding that the sidewalks adjacent to the Supreme Court were a public forum).[6] These areas have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 83 L. Ed. 1423, 59 S. Ct. 954 (1939). As a result, sidewalks, streets, and parks generally

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[6] It is a matter of some debate whether the category of traditional public forum includes properties other than streets, sidewalks, and parks. The Supreme Court's willingness to explore whether mailboxes were a traditional public forum implied that this category was not strictly limited. *See United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128-29, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981). However, the Court also has stated in dicta that "the Court has rejected the view that traditional public forum status extends beyond its historic confines." *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 678, 140 L. Ed. 2d 875, 118 S. Ct. 1633 (1998). Considering this statement, the Fourth Circuit has noted:

> The Court has never precisely stated what these confines are, however. For instance, the Court has never defined the terms "street," "sidewalk," or "park." Nor has the Court strictly limited the traditional public forum category to streets, sidewalks, and parks.

Warren v. Fairfax County, 196 F.3d 186, 192 (4th Cir. 1999) (en banc). Deeming forum analysis a useful tool rather than a "straitjacket," the Second Circuit has considered "not only whether the Plaza falls within those categories of property historically deemed to be traditional public fora, but also whether it is the *type* of property that should be so classified." *H.E.R.E. v. City of New York*, 311 F.3d at 546.

"are considered, without more, to be 'public forums.'" *Grace*, 461 U.S. at 177; *see also Frisby v. Schultz*, 487 U.S. at 481 ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.").

B.

No clear-cut test has emerged for determining when a traditional public forum exists. In the absence of any widespread agreement upon how to determine the nature of a forum, courts consider a jumble of overlapping factors,[7]

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[7] *See, e.g.*, *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-82, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992) (evaluating lack of historic use, absence of free access to the public or use for the exchange of ideas, and separation from acknowledged public areas in concluding that airports are nonpublic forums); *United States v. Kokinda*, 497 U.S. 720, 727-28, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) (plurality) (assessing thoroughfare status and current uses); *ACORN*, 150 F.3d 695 (7th Cir. 1998) (balancing interests and also considering public thorough-fare status, value of area as expressive locale, and government interest in commercial revenues); *Hale v. DOE of Energy*, 806 F.2d at 916 (9th Cir. 1986) (considering public thoroughfare status and open access to public); *Int'l Soc'y for Krishna Consciousness v. New Jersey Sports & Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982) (considering dedication of arena to recreational use and inconsistency between free speech and governmental interests); *Citizens to End Animal Suffering & Exploitation v. Faneuil Hall Marketplace*, 745 F. Supp. 65, 75-76 (D. Mass. 1990) (considering historic use and use as a pedestrian connection to purely public adjoining areas).

frequently deeming a factor dispositive or ignoring it without reasoned explanation. Consequently, courts do not always agree on the goals and proper application of forum analysis. *See, e.g.*, Suzanne Stone Montgomery, *Note, When the Klan Adopts-a-Highway: The Weaknesses of the Public Forum Doctrine Exposed*, 77 Wash. U. L.Q. 557, 558 (1999) ("[F]our different federal courts, confronted with three substantially similar programs, approached the public forum doctrine in five different ways . . . [and] reached three different decisions regarding the type of forum at issue.").

However, the factors emphasized by the courts consistently reflect two underlying considerations. First, and most significantly, there is a common concern for the compatibility of the uses of the forum with expressive activity. As the Supreme Court has stated, "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *see also Hale*, 806 F.2d at 915-16 (holding that where land "has been withdrawn from public use for the purpose of conducting nuclear testing[, i]ts use for expressive, as well as nonexpressive, activity by the public is limited"); *Warren v. Fairfax County, 196 F.3d at 192-93* (noting that "[o]ne characteristic has been assumed in all of the Supreme Court cases that address [public forums]: opening the nonpublic forum to expressive conduct will somehow interfere with the objective use and purpose to which the property has been dedicated"); *H.E.R.E. v. City of New York*, 311 F.3d at 552 ("Consideration of the relevant factors . . . demonstrates that permitting all forms of expressive activity in the Plaza would be incompatible with its 'intended purpose' . . . .");

Lederman v. United States, 351 U.S. App. D.C. 386, 291 F.3d 36, 41 (D.C. Cir. 2002) (stating that "courts have long recognized that [the areas in question] meet the definition of a traditional public forum: They have traditionally been open to the public, and their intended use is consistent with public expression").

Secondly, the case law demonstrates a commitment by the courts to guarding speakers' reasonable expectations that their speech will be protected. *See, e.g.*, *Grace*, 461 U.S. at 180 (expressing concern regarding allegedly nonpublic forums that provide "no separation . . . and no indication whatever to persons . . . that they have entered some special type of enclave."); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir. 1993) (noting that area at issue "is still part of the park and it is indistinguishable from other sections of the park in terms of visitors' expectations of its public forum status"); *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487, 494 (7th Cir.), *as amended* (2000) ("No visual boundaries currently exist that would inform the reasonable but unknowledgeable observer that the Fund property should be distinguished from the public park."). "The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people." *Lee*, 505 U.S. at 696 (Kennedy, J., concurring). Remaining focused upon these underlying concerns may enable us to avoid the accusation of applying forum analysis in a rigidly formulaic manner.

Our circuit has emphasized the following three factors in considering whether an area constitutes a traditional public

forum: 1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area, *see, e.g.*, *Venetian Casino Resort*, 257 F.3d at 944-45, 948; *Hale*, 806 F.2d at 916; 2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area, *see, e.g.*, *Gerritsen*, 994 F.2d at 576; and 3) traditional or historic use of both the property in question and other similar properties, *see, e.g.*, *Venetian Casino Resort*, 257 F.3d at 944, *Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997). Consideration of each of these three factors supports the conclusion that the Fremont Street Experience is a traditional public forum.

We consider the uses and purpose of a property because, by informing us of the compatibility of expressive activity with other uses of the property, they enable us to evaluate the societal costs of allowing versus restricting speech. *See Hale v. Dep't of Energy*, 806 F.2d at 915-16. Thus, when a property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity because these uses are inherently compatible with such activity. *See, e.g.*, *Venetian Casino Resort*, 257 F.3d at 943. Use of a forum as a public thoroughfare is often regarded as a key factor in determining public forum status. *See, e.g.*, *Jacobsen v. Bonine*, 123 F.3d at 1274; *Kokinda*, 497 U.S. at 727-28 (plurality). Our sister circuits agree that "expressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage." *First Unitarian Church*, 308 F.3d at 1128 (10th Cir. 2002); *see also Lederman*, 291 F.3d at 43 (D.C. Cir. 2002) ("If people entering and leaving the Capitol can avoid running headlong into tourists, joggers,

dogs, and strollers . . . then we assume they are also capable of circumnavigating the occasional protester."); *Warren*, 196 F.3d at 189-90 (4th Cir. 1999) (en banc); *cf. ACORN,* 150 F.3d at 702 (7th Cir. 1998) (concluding that sidewalks at Navy Pier entertainment complex were not public forums because they were not "part of the city's automotive, pedestrian, or bicyclists' transportation grid").

Indeed, the City has conceded that the use of a property as a public thoroughfare is frequently dispositive, acknowledging in discussing *First Unitarian Church* that "because the actual purpose and use of [the contested area] was as a pedestrian throughway for the general public, it met the classic definition of a public forum." The City seeks to avoid the logical consequence of this concession by urging us to adopt the Second Circuit's view that it is a forum's "*primary* function and purpose" that is significant in determining whether traditional public forum status applies. *H.E.R.E. v. City of New York*, 311 F.3d at 551 (emphasis added); *see also id.* at 550 ("The ability of pedestrians to cross the Plaza as a short-cut between surrounding streets is merely an incidental feature of its principal function as the entrance plaza for the Lincoln Center complex."). We decline to accept this invitation for two reasons.

First, we believe that this view elevates form over substance, engaging in precisely the type of rigid pigeonholing that is insufficiently protective both of the right to free speech and of the ability of the government to regulate property under its control. *See* TRIBE, *supra*, at 993 ("An excessive focus on the public character of some forums . . . can leave speech inadequately protected in some cases, while unduly hampering state and local authorities in others.")

(citations omitted). The fact that the *primary* use of the property is not as a park or public thoroughfare is *irrelevant* as long as there is no concrete evidence that use for expressive activity would significantly disrupt the principal uses. *See, e.g.*, *Lederman*, 291 F.3d at 42 (concluding that "the primary purpose for which the Capitol was designed -- legislating -- is entirely consistent with [expressive activities]" (internal quotation marks omitted)).

Strengthening our conviction is the fact that if this proposal were imposed uniformly, there would be *no* traditional public forums. It has frequently been observed that the "notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction." *Lee*, 505 U.S. at 696 (Kennedy, J., concurring); *see also Warren v. Fairfax County*, 196 F.3d at 195 ("The primary purpose for which a particular piece of property was created is not dispositive. One cannot seriously argue with Justice Kennedy's observation that the traditional public fora of streets, sidewalks, and parks are not primarily designed for expressive purposes.").[8] The standard proposed

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[8] On this same note, Justice Brennan once stated in dissent:

> Public sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has not constructed them for expressive purposes. Parks are usually constructed to beautify a city and to provide opportunities for recreation, rather than to afford a forum for soapbox orators or leafleteers; streets are built to facilitate transportation, not to enable protesters to conduct marches; and sidewalks are created with pedestrians in mind, not solicitors. Hence, *why* the sidewalk was built is not salient.

by the City would have us erect a barrier to speech unsupported by the requirements of either compatibility or notice, the foundational reasons justifying forum analysis.

The use and purpose of the Fremont Street Experience support the conclusion that it is a traditional public forum. Despite its expensive make-over, the Fremont Street Experience remains a public thoroughfare. Although cars are no longer permitted to drive down the length of the Fremont Street Experience, the agreement between FSELLC and the City requires that a route for pedestrians remain open at all times, limiting FSELLC's discretion to manipulate the landscape. Additionally, automotive traffic is permitted to cross the Fremont Street Experience in two places, and pedestrians cross at each intersection. The addition of entertainment to the Fremont Street Experience's uses does not alter the fact that it remains a public thoroughfare and a shopping and gambling district.

The second factor emphasized by our cases involves the physical characteristics of a forum. Similarity to other traditional public forums not only indicates suitability for the conduct of expressive activity, but additionally, areas that are centrally located and integrated into the surrounding locale provide no alteration of expectations that would justify non-public forum status. *See Gerritsen v. City of Los Angeles*, 994 F.2d at 576 (holding that an area widely viewed as the heart of a park was a public forum); *see also Jacobsen v. Bonine*, 123 F.3d at 1273-74 (holding that roadside stops are not

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Kokinda, 497 U.S. at 744 (Brennan, J., dissenting).

public forums, in part because they are isolated appendages to highways); *ACORN*, 150 F.3d at 702 (noting that the Navy Pier commercial and entertainment complex is a "discrete, outlying segment or projection of Chicago rather than a right of way" and deeming it nonpublic). We have held that cosmetic differences, such as distinctive pavement and landscaping, are insufficient to distinguish an area from surrounding public forums. *Venetian Casino Resort*, 257 F.3d at 945; *see also Gerritsen*, 994 F.2d at 576 (holding that blue lines on the pavement and a unique commercial atmosphere did not mark off Olvera Street in El Pueblo Park as a nonpublic forum).

The Fremont Street Experience is still a street: the name alone is somewhat indicative.[9] Additionally, City and State codes define pedestrian malls generally, and the Fremont Street Experience specifically, as streets.[10] Stores and

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[9] But note that the government's public characterizations of a disputed area may be unreliable. In the Recommending Committee Meeting of August 14, 1995, in which extensive testimony was taken regarding the negative impacts of solicitation on Fremont Street, Deputy City Attorney Jerbic recommended striking all references to the word street in the Pedestrian Mall Ordinance. The Supreme Court clearly had such linguistic manipulation in mind when it stated, "Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property." *Grace*, 461 U.S. at 180.

[10] Section 268.811(3) of the Nevada Revised Statutes states: "'Pedestrian mall' means an area including portions of one or more streets or alleys that has been set aside for use primarily by pedestrians and to which access by motor vehicles is prohibited or

businesses still line the sides of Fremont Street, and as it is located squarely in the middle of downtown, pedestrians cut across it and walk down its length. The Fremont Street Experience remains open to the elements despite the canopy and light-show. Although there is no doubt that the decorative pavement, barriers to cars, and canopy indicate to the public that the Fremont Street Experience is not simply another street, its openness to the public and smooth integration into downtown preserve its public forum status.

The final factor that we consider in determining whether an area is a traditional public forum is its historic use as a public forum and whether it is part of the class of property which, by history and tradition, has been treated as a public forum. *Venetian Casino Resort*, 257 F.3d at 943-44 (considering the fact that the sidewalk that was replaced had historically been a public forum); *Jacobsen v. Bonine,* 123 F.3d at 1274 (noting that interstate rest stop areas, as relatively modern creations, have not traditionally been used for expressive activity). This factor is invariably mentioned. *See, e.g.*, Lee, 505 U.S. at 680-81; *Grace*, 461 U.S. at 178-79 (holding that although traditionally property itself had not been held open for use of public, it was a public forum because it belonged to the class of property historically available for expression); *First Unitarian Church*, 308 F.3d

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restricted." The Las Vegas Municipal Code provides that a sidewalk is "any surface provided for the exclusive use of pedestrians." LVMC 13.24.010(E). The Fremont Street Experience itself was defined in section 11.68.040(A) of the Las Vegas Municipal Code as constituted and comprised by "the following streets and rights-of-way."

at 1129; *Freedom from Religion*, 203 F.3d at 494; *Warren*, 196 F.3d at 190, 196.

The Fremont Street Experience meets the requirements of traditional use; there is no dispute that Fremont Street was historically a public forum. Moreover, our case law indicates that we regard public pedestrian malls and commercial zones as the type of property traditionally used as a public forum. Thus, in *Gaudiya Vaishnava Society v. City & County of San Francisco*, we held that San Francisco's commercial Fisherman's Wharf and Union Square districts were public forums. 952 F.2d 1059, 1061, 1065 (9th Cir. 1990), *as amended* (9th Cir. 1991). Despite their concentration of businesses, their distinctive character, and their role in fostering commerce, we considered them to be public streets, and hence traditional public forums. *Id.* Likewise, in *Gerritsen v. City of Los Angeles*, we acknowledged that "the Olvera Street area is a distinctive section of the park, with a unique historic and cultural atmosphere which is designed to foster commercial exchange." 994 F.2d at 576. Nonetheless, we held that Olvera Street's "special ambience" did not diminish its public forum status. *Id.*; *see also Perry v. L.A. Police Dep't*, 121 F.3d 1365, 1368, 1369 (9th Cir. 1997) (holding that the Venice Beach Boardwalk was a traditional public forum, and its commercial nature was relevant not to public forum status, but to the outcome of the time, place, and manner test). The Fremont Street Experience was not only historically a public forum, but also falls into the type of property that is traditionally regarded as a public forum.

In concluding that the Fremont Street Experience was a nonpublic forum, the district court relied upon the fact that it was created for the purpose of stimulating commercial

activity, not promoting expression. However, the intent of a government to create a nonpublic forum has no direct bearing upon traditional public forum status. *Ark. Educ. TV Comm'n*, 523 U.S. at 678; *First Unitarian Church*, 308 F.3d at 1124 ("We first reject the contention that the City's express intention not to create a public forum controls our analysis."); *Henderson v. Lujan*, 296 U.S. App. D.C. 58, 964 F.2d 1179, 1182-83 (D.C. Cir.), *as amended* (D.C. Cir. 1992) (holding that the argument that intent to forbid expressive conduct is relevant to forum analysis "misconceives the role of government intent and practice"). As the Supreme Court has made clear, "traditional public fora are open for expressive activity regardless of the government's intent." *Ark. Educ. TV Comm'n*, 523 U.S. at 678.

Thus, the City's claim that "the government's 'subjective intent' is a key factor in public forum analysis" conflates the factors necessary for the creation of a designated public forum with those for a traditional public forum. *See, e.g., id.* at 677 (contrasting traditional public forums, which are "defined by the objective characteristics of the property," with designated public forums, which are created "only by *intentionally* opening a nontraditional public forum for public discourse" (emphasis added)); *First Unitarian Church*, 308 F.3d at 1124 ("It is only with respect to designated fora that the Supreme Court's forum analysis has focused on whether there has been 'purposeful government action' creating a forum 'in a place not traditionally open to assembly and debate.'" (quoting *Ark. Educ. TV Comm'n*, 523 U.S. at 677)); *cf. Kreisner v. City of San Diego*, 1 F.3d at 785.[11]

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[11] Cases cited by the City for the proposition that "governmental intent is said to be the 'touchstone' of forum analysis" relate to

If the government's intent were a factor in determining the existence of a traditional public forum, any new public area, even a new street or park, could be created as a nonpublic forum as long as the government's intent to do so were memorialized in restrictive statutes or statements of purpose.[12] This result would make a mockery of the protections of the *First Amendment*. Rather than permit such an outcome, we clarify that government intent is relevant only insofar as it

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designated public forums, not traditional public forums. *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 279 (2d Cir. 1997) (concluding that military exchanges were nonpublic forums, rather than designated public forums, and thus Congress might ban the sale or rental of sexually explicit materials); *see also id.* at 279 n.7; *Jacobsen v. Bonine*, 123 F.3d at 1274 (discussing "location and purpose" and "subjective intent" as factors in forum analysis in *Kokinda*, 497 U.S. 720, 111 L. Ed. 2d 571, 110 S. Ct. 3115, the first relating to traditional public forums and the second to designated public forums). The only case that we have found that clearly holds that government intent is a factor in evaluating traditional public forum status, *H.E.R.E. v. City of New York*, attempts to distinguish the myriad cases to the contrary by stating that they stand only for the proposition that "government may not alter by fiat what is indisputably a traditional public forum." 311 F.3d at 551 n.12. We respectfully disagree with this reading of the cases, as well as with the practical implications of this holding.

[12] Such a conclusion would generate an increase in clearly questionable decisions, such as that in *Chad v. City of Fort Lauderdale*, in which a district court determined that a newly-built sidewalk next to a beach was not a traditional public forum because "having been built two years ago, [it] has not been a traditional site for expressive conduct." 861 F. Supp. 1057, 1061 (S.D. Fla. 1994).

relates to the objective use and purpose of an area.[13] Thus, the (intentional) addition of entertainment to the functions of Fremont Street may be relevant to forum analysis, but the government's intent in and of itself is not a factor.

C.

An additional consideration also persuades us that the Fremont Street Experience is a traditional public forum. The parties agree that Fremont Street was historically a public forum. Although it is possible for a public forum to lose its status, "the destruction of public forum status . . . is at least presumptively impermissible." *Grace*, 461 U.S. at 180; *see also Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir.), *as amended* (9th Cir. 1993) (expressing "grave doubts about the City's ability, should it so choose, to withdraw the [park] from its status as a traditional public forum"). The government "may not by its own *ipse dixit* destroy the public forum status of streets and parks which have historically been public forums." *Grace*, 461 U.S. at 180 (quoting *Greenburgh Civic Ass'ns*, 453 U.S. at 133) (internal quotation marks omitted). As a result, the onus is on the Defendants to demonstrate that the area encompassed by the Fremont Street Experience is no longer a street and has lost its public forum status.

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[13] We note that any confusion regarding the use of intent as a factor in a traditional public forum analysis may have been exacerbated by the fact that the word "purpose," which is properly a factor when considered in its meaning of "use," can also be defined as "intent." As we emphasize here, this second meaning of purpose is not a proper factor in analysis of traditional public forum status.

In order to change a property's public forum status, the state "must alter the objective physical character or uses of the property." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. at 700 (Kennedy, J., concurring); *see also Venetian Casino Resort*, 257 F.3d at 944 (rejecting the idea that relocation of a sidewalk had fundamentally altered its character or use so as to permit a change in its public forum status); *Hale*, 806 F.2d at 915 (holding that roadway was no longer a public forum because "the land containing the roadway has been withdrawn from public use for the purpose of conducting nuclear testing"). In the case of the Fremont Street Experience, there has been no fundamental alteration of character or use. The principal uses of Fremont Street, both before and after its transformation, are as a commercial district and public thoroughfare. The grime of Fremont Street has been scrubbed away and it has been dramatically redesigned, but its character as a central commercial street remains.

The Fremont Street Experience is a traditional public forum: its public forum status was not destroyed by its transformation, and its current characteristics are those of a public forum.[14]

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[14] Because we conclude that the Fremont Street Experience is a public forum, we need not consider the ACLU's alternative argument that the ordinances violate the *equal protection clause* by exempting certain labor-related activities from the prohibitions. Nor need we consider the ACLU's contention that the district court erred in finding that the Fremont Street Experience was a nonpublic forum without an evidentiary hearing and in excluding certain exhibits and portions of affidavits.

Additionally, we deny the ACLU's motion to partially strike

IV.

Because the district court erroneously found that the Fremont Street Experience was a nonpublic forum, it applied an improper standard to measure the appropriate balance between government regulation and free expression. Instead, the challenged restrictions must be evaluated under the more demanding standard applicable in a traditional public forum. We proceed to address the district court's determinations as to the Plaintiffs' challenges to the restrictions on leafletting, vending, solicitation, and the use of tables.

A. Leafleting

The district court struck down LVMC section 11.68.100(I)'s outright ban on "in-person distribution to passers-by in a continuous or repetitive manner of any physical or tangible things and printed, written or graphic materials," finding that even under the lesser standard of reasonableness the ordinance did not survive. Clearly, the ban on leafleting cannot survive the more rigorous standard appropriate for a public forum.

In order to impose restrictions on the time, place, or manner of protected speech in a public forum, the restriction must be "justified without reference to the content of the

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cross-appellants's reply brief and to supplement the record. The "new" arguments raised in the City's reply brief were a reasonable response to points made in the ACLU's answering brief. With respect to the request to supplement the record with newspaper clippings, these documents were not presented to the district court and the ACLU has not shown a compelling reason why we should consider them now. Accordingly the ACLU's motion is denied.

regulated speech . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)). Although the ban on leafleting is content-neutral, such an absolute ban is clearly not narrowly tailored, nor does it leave open ample alternative channels for communication. *Schneider v. New Jersey*, 308 U.S. 147, 162-63, 84 L. Ed. 155, 60 S. Ct. 146 (1939) (holding that prevention of littering is insufficient to justify prohibition on leafleting on public street). The injunction against the leafleting ordinance was properly granted under any standard, and thus we uphold the summary judgment and permanent injunction with regard to this subsection of the ordinance.

B. Vending of Materials with Messages

The vending ordinance prohibits vending "unless conducted or authorized by The Fremont Street Experience Limited Liability Company." LVMC § 11.68.100(B). The district court found that this restriction provided government officials with unbridled discretion to regulate speech, and therefore it was unconstitutional even under a reasonableness standard. We agree with the district court that by placing the decision whether to authorize vending wholly within the discretion of an FSELLC official, the ordinance created a situation ripe for abuse, in violation of the First Amendment.

"It is unconstitutional to grant an official unfettered discretion to deny a permit application." *Gaudiya*, 952 F.2d at 1066 (internal quotation marks omitted). Discretionary

permits are intolerable because of "two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988).

At issue in *Lakewood* was a standardless discretionary ordinance requiring newspaper publishers to obtain annual permits if they wished to place newsracks on public property. *Id.* The Court emphasized two factors in holding that a facial challenge to an ordinance is appropriate "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity." *Id.* at 755. First, the Court saw a significant danger of self-censorship and viewpoint discrimination in the requirement that publishers apply each year for a permit, because the licensor could "measure [the proposed expression's] probable content or viewpoint by speech already uttered." *Id.* at 759. Secondly, because the *Lakewood* permitting system involved newspapers, it was "directed narrowly and specifically at expression or conduct commonly associated with expression." *Id.* at 760. These two factors, taken together, justified allowing a facial challenge to proceed.

These same factors are present here. Our cases show that "[t]he sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message falls under the protection of the *First Amendment*." *Gaudiya Vaishnava Society*, 952 F.2d at 1063; *see also Perry v. Los*

Angeles Police Dep't, 121 F.3d at 1368; *One World One Family v. City & County of Honolulu*, 76 F.3d 1009 (9th Cir. 1996); *see also Heffon v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 647, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981).

Moreover, the vending ordinance raises the spectre of both censorship and self-censorship. The ordinance says nothing about how the power to regulate vending is to be wielded, and it is so lacking in standards that it provides no guidance as to the permit duration or frequency of reapplication. As a result, there is considerable danger that the content of prior speech, or simply the goals of an organization, might inform the permitting process. Although the highly exacting standards of *Freedman v. Maryland*, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965), are not required for a content-neutral permit scheme like the present one, limits on the discretion of the licensor are necessary to prevent viewpoint or content discrimination. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322-23, 151 L. Ed. 2d 783, 122 S. Ct. 775 (2002). Such limits must provide "'narrowly drawn, reasonable and definite standards'" that are "reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.'" 1122 S. Ct. at 781 (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992)). The district court clearly acted correctly in granting summary judgment to Plaintiffs and issuing a permanent injunction against enforcement of this ordinance with respect to message-bearing merchandise.

C. Solicitation

Applying the scrutiny appropriate for a nonpublic forum,

the district court found that the prohibition on solicitation was reasonable in light of the City's interests in promoting the commercial purpose of the Fremont Street Experience. As we have concluded, the appropriate standard is that which pertains to a public forum. Because solicitation is an expressive activity, and hence is protected under the First Amendment, the district court will need to determine on remand whether the City is able to show that the restriction is narrowly tailored to serve a significant government interest without "burdening substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 798-99; *see also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980) (holding that "charitable appeals for funds, on the street or door-to-door, involve a variety of speech interests -- communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes -- that are within the protection of the First Amendment"); *Gaudiya*, 952 F.2d at 1064 ("'Informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues' is fully protected.").

D. Use of Tables

Section 11.68.100(H)'s ban on the unauthorized erection of structures includes "the placement of any table . . . within the Pedestrian Mall." Just as with the solicitation ordinance, we remand this issue to the district court to apply the heightened standard of scrutiny. Remand to the district court also will allow further exploration of the factual record, as well as clarification regarding whether the Plaintiffs intended to assert an as-applied or facial challenge to this ordinance.

The Plaintiffs may wish to clarify their claim by seeking leave to amend their complaint in the district court.

We note that in order for the Plaintiffs to challenge successfully the constitutionality of the City's restrictions on the use of tables, they must show that the erection of tables falls under the protection of the *First Amendment*. *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996); *One World One Family Now, Inc. v. Nevada*, 860 F. Supp. 1457 (D. Nev. 1994). Some tension exists among the circuits on the question of whether setting up a table is conduct commonly associated with expression.[15] *Compare One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1285-86 (11th Cir. 1999) (finding that tables used to distribute protected literature are within the protection of the First Amendment), and *One World One Family Now v. City of Key West*, 852 F. Supp.

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[15] Our cases indicate that tables often are used in association with core expressive activities, such as gathering signatures, distributing informational leaflets, proselytizing, or selling message-bearing merchandise. *See, e.g.*, *Gaudiya*, 952 F.2d at 1060 ("As part of its activities, Greenpeace sets up tables in the city of San Francisco to bring its [environmental] message to the general public and solicit financial contributions and membership. . . . [San Francisco Nuclear Weapons Freeze Campaign] communicates its message and solicits money by setting up tables in San Francisco . . . . To raise funds and disseminate its message, [the Committee in Solidarity with the People of El Salvador] operates street corner tables . . . ."). Tables facilitate these activities by enabling the display of multiple pamphlets or other items, as well as the distribution of a greater amount of material. Additionally, the use of a table may convey a message by giving an organization the appearance of greater stability and resources than that projected by a lone, roaming leafleteer.

1005, 1009-10 (S.D. Fla. 1994) (finding portable T-shirt tables protected because they are more analogous to newsracks than to newsstands), *with Int'l Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263, 270 (7th Cir. 1978) (briefly noting that a provision, not challenged by plaintiffs, that prohibited erecting a table or other structures in an airport did not facially restrict the exercise of guaranteed rights). Thus, the issue may benefit from consideration in light of the specific factual context.

E. General Injunction

Likewise, we reverse the district court's denial of an injunction against interference with First Amendment activities on the Fremont Street Experience. We remand this issue to the district court for consideration in light of the public forum status of the Fremont Street Experience.

CONCLUSION

In sum, we reverse the district court's determination that the Fremont Street Experience was not a public forum. We affirm the district court's grant of summary judgment to the ACLU and issuance of a permanent injunction against enforcement of the leafleting ordinance, LVMC § 11.68.100(I), and vending ordinance with respect to the sale of message-bearing items, LVMC § 11.68.100(B). We reverse the district court's grant of summary judgment to the Defendants with regard to the general injunction and solicitation and tabling ordinances, LVMC §§ 10.44 and 11.68.100(H), and remand to allow the district court to consider the constitutionality of these restrictions in light of the Fremont Street Experience's public forum status.

The Plaintiffs shall recover their costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 01-15958

[Filed August 25, 2003]

AMERICAN CIVIL LIBERTIES UNION OF NEVADA; et al.,
Plaintiffs-Appellants,

v.

CITY OF LAS VEGAS; et al.,
Defendants-Appellees.

AMERICAN CIVIL LIBERTIES UNION OF NEVADA; et al.,
Plaintiffs-Appellees,

v.

CITY OF LAS VEGAS; et al.,
Defendants-Appellants.

Before: PAEZ, Circuit Judge.

ORDER

Appellees' motion to stay the mandate pursuant to Federal Rule of Appellate Procedure 41 is granted.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-97-1419-DWH (LRL)

[Filed April 4, 2001]

AMERICAN CIVIL LIBERTIES UNION OF NV., et al, Plaintiffs,	)
v.	)
CITY OF LAS VEGAS, et al, Defendants.	)

JUDGMENT IN A CIVIL CASE

__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

X **Decision by Court**. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiffs'

motion for Summary Judgment is GRANTED in part; DENIED in part. Defendants' countermotion for Summary Judgment is GRANTED in part; DENIED in part. Defendants shall be permanently enjoined from enforcing LVMC 11.68.100(I). Defendants shall be permanently enjoined from enforcing LVMC 11.68.100(B) against plaintiffs with respect to sale of merchandise constituting a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of plaintiffs' organizations. Judgment is hereby entered in favor of the plaintiffs ACLU, et al, and the defendants City of Las Vegas, et al, and against the plaintiffs ACLU, et al and the defendants, City of Las Vegas, et al.

April 4, 2001

LANCE S. WILSON
Clerk of the Court

/s/ Grace Walters
(By) Deputy Clerk

District Court Judgment & Order - 04/04/01

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-97-1419-DWH (LRL)

[Filed April 4, 2001]

AMERICAN CIVIL LIBERTIES UNION OF NV., et al, Plaintiffs,	)
v.	)
CITY OF LAS VEGAS, et al, Defendants.	)

ORDER

Before the Court is plaintiffs' Motion for Summary Judgment (#75). The defendants have opposed the plaintiffs' motion (#76), and submitted a Countermotion for Summary Judgment (#77). The plaintiffs have replied to the defendants' opposition (#82) and submitted an opposition to the defendants' Countermotion for Summary Judgment (#83), to which the defendants have replied (#86). Also before the court is defendants' Objection and Motion to Strike Plaintiffs' Summary Judgment Evidence (#78). The plaintiffs have opposed this motion (#84), and the defendants have replied (#86).

I. Factual and Procedural Background

The Fremont Street Experience Mall (the "Mall") was created by the City pursuant to the Pedestrian Mall Act, N.R.S. § 268.810 et seq. See LVMC § 11.68.010 *et seq.* It was intended to provide an attraction to compete with the Strip and bring tourists and business back to the sagging downtown casinos and businesses. See LVMC § 11.68.010. The City contracted with FSELLC, a private entity, to construct, operate and maintain the Mall. LVMC § 11.68.060. FSELLC has principal control over all commercial uses and aspects of the property. See LVMC § 11.68.070. Although downtown casinos contributed $25 million to the Mall's initial building costs of $70 million, FSELLC is solely responsible for paying the Mall's operation and maintenance expenses of approximately $6 million to $10 million annually.

Construction on the Mall began in September 1994 and the Mall opened in December 1995. The Mall spans a five-block length of what used to be Fremont Street before Fremont Street was closed and the street and its sidewalks demolished and excavated. It also includes Cul-de-sac areas on First and Third Streets in which the sidewalks and streets were closed and demolished. After the existing streets and sidewalks were demolished, holes were dug for columns to support the ten-story "celestial superstructure" which was installed over the Fremont Street area. A fifty-foot wide strip of special high-strength concrete was poured over the area. It was coated, stained and formed into a pattern designed to guide pedestrian traffic flow. In addition, underground utilities systems, a special irrigation system, and sound and lighting systems were installed in the Mall complex to

facilitate the use of retail carts and kiosks, to service landscaping, and to accommodate special events and activities.

Plaintiffs filed their complaint (# 1) for declaratory and injunctive relief on October 9, 1997, alleging that certain City ordinances and FSELLC policies infringe on their First Amendment rights. In particular, plaintiffs challenge the prohibition of the distribution of literature or other written material at the Mall pursuant to LVMC § 11.68,100(I), the prohibition against the solicitation of funds at the Mall pursuant to LVMC § 10.44.030, and all other FSELLC-imposed restrictions on public education or protest activities pursuant to contract or LVMC § 11.68.100. The challenged provision in LVMC § 10.44.030 was enacted in January 1995. The challenged provision in LVMC § 11.68.100 was enacted in August 1995.

On January 9, 1998, defendants FSELLC and Mark Paris moved (#18) to dismiss plaintiffs' complaint, or in the alternative, for summary judgment. Defendants City of Las Vegas and Mayor Jones joined (#16) in that motion. On January 20, 1998, plaintiffs filed a motion (#21) for a preliminary injunction. In the motion for preliminary injunction, plaintiffs sought an order enjoining defendants from enforcing the following ordinances or policies on the premises of the Mall: (1) LVMC § 11.68.(100)(1) (prohibiting distribution of literature or other written material); (2) LVMC § 10.44.030 (prohibiting solicitation of funds); and (3) all other FSELLC-imposed restrictions on plaintiffs' free speech rights.

On April 24, 1998 this court granted the plaintiffs' motion in part and denied it part, and granted the defendants' motion in part and denied it in part. In its order this court held that: (1) newspaper articles were inadmissible as hearsay; (2) portions of the affidavits that were not based on personal knowledge or stated legal conclusions would not be considered; (3) the mall area in question was neither a traditional public forum nor a designated public forum; (4) the plaintiffs had established the likelihood of success on the merits of their claim that the city's anti-leafleting ordinance violated the equal protection clause; (5) the City's ban on solicitation in the mall was reasonable; (6) the licensing scheme for vending in the mall likely violated the First Amendment; (7) the plaintiffs had established irreparable harm as to the ban on leafleting and the licensing scheme but did not show that the balance of harms tipped in their favor a to the ban on solicitation or the policies of the mall operator; (8) the ban on solicitation did not violate the First Amendment; and, (9) the alleged policy or permit system regarding the placement of tables racks, chairs and other similar structures in the mall did not violate the First Amendment. *See American Civil Liberties Union v. City of Las Vegas,* 13 F. Supp. 2d 1064 (D. Nev. 1998)

On September 14, 2000, this court convened a status conference due to the failure to prosecute this action. At this conference both parties stipulated that no further discovery was necessary and that this action could be disposed of by a motion for summary judgment. On November 1, 2000, plaintiffs submitted their Motion for Summary Judgment, which was followed by the defendants' Countermotion for Summary Judgment.

II. Analysis

A. Defendants' Objections to Plaintiffs' Evidence

The defendants' first argument is that the some of the witnesses and evidence submitted with the plaintiffs' Motion for Summary Judgment were not disclosed prior to the close of discovery and must be excluded. Defendants argue that LR 26-1(a)(2) requires parties to identify witnesses who are likely to have knowledge of material facts upon which a party bases its claims and defenses. They further argue that Fed. R. Civ. P. 37(c)(1) states that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26 (e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing or on a motion any witness or information not so disclosed." Defendants cite four witnesses who's affidavits appear in Plaintiffs' Exhibits 4, 6, 15, and 16, who were not disclosed to the them before the close of discovery. Defendants argue that the addresses nor any other information about a substantial number of the plaintiffs' witnesses has never been disclosed. The plaintiffs contend that the four new witnesses were not submitted before the close of discovery because their statements are based on a new incident that occurred after the close of discovery that will be discussed further below.

The defendants contend that the evidence of events that occurred during an "orchestrated event" on October 24, 2000, should be excluded as well. Defendants claim that the plaintiffs orchestrated the event after the close of discovery in order to bolster their evidence of an applied challenge to the ordinances in question. Fed. R. Civ. P. 37(c)(1) prohibits the exclusion of evidence introduced in violation Rule 26 if there

is "substantial justification" for the failure to disclose the evidence during discovery. In the September 24, 2000, hearing concerning the status of the case both parties stipulated that no additional discovery would be required to dispose of this case by motion. The plaintiffs justify this evidence after the close of discovery on the grounds that it is new, and was not available before the close of discovery. The court finds little prejudice in the evidence regarding the incident, nor the affidavits describing it, and thus will not exclude them in considering their motion.

The defendants further argue that the plaintiffs' exhibits also contain statements from newspaper articles and other declarations that this court has already ruled inadmissible. For the reasons stated in the courts previous ruling, the newspaper articles found in plaintiffs' motion at Exhibit 1, attachment a-d are excluded from evidence. *See City of Las Vegas* at 1069-1070. The defendants are also seeking to exclude portions of some of the affidavits submitted with the plaintiffs' motion because they include hearsay, statements lacking personal knowledge, and ultimate facts and legal conclusions. In its previous ruling, this court advised plaintiffs that their affidavits could not contain such statements. Affidavits must be based on personal knowledge and must not contain conclusions of law or ultimate facts. *See Kim v. United States,* 121 F.3d 1269, 1276-77 (9th Cir. 1997) (rejecting affidavit no based on personal knowledge); *A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 121 (6th Cir. 1981) (finding conclusions of law in affidavit were not entitled to any weight). "When ultimate facts or conclusions appear in an affidavit which also contains the proper subject of affidavit testimony, facts within the personal knowledge of the affiant, the extraneous material should be disregarded and

only the facts considered." *See A.L Pickens,* 650 F.2d at 121. For these reasons all statements within the plaintiffs' affidavits that contain hearsay, conclusions of law, and or statements lacking personal knowledge will not be considered by the court.

B. Summary Judgment Motions

a. Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party. *See Zoslaw v. MCA Distr: Corp.,* 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied,* 460 U.S. 1085 (1983). For this purpose, the material lodged by the moving party must be viewed in the lightmost favorable to the nonmoving party. *See Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 157 (1970); *Baker v. Centennial Ins. Co.,* 970 F.2d 660, 662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the math. *See S.E.C. v. Seaboard Corp.,* 677 F.2d 1301, 1306 (9th Cir. 1982).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986).

> [T]here is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id. at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979). Moreover, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Architectural Bldg. Products v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied,* 484 U.S. 1006 (1988).

b. Plaintiffs' Causes of Action

Plaintiffs' action for declaratory and injunctive relief consists of two claims. Plaintiffs' first cause of action alleges that defendants' conduct in enforcing certain,City ordinances and FSELLC policies deprives plaintiffs of their First and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983. Complaint (#1) ¶¶ 36-39. Plaintiffs allege that the City's anti-solicitation and anti-leafleting ordinances are unconstitutional on their face and as applied to plaintiffs. *Id.* ¶ 38. Further, plaintiffs allege that to the extent FSELLC policies allow plaintiffs to engage in First Amendment

activities only on a permit or request basis, the lack of standards governing FSELLC's discretion in making this determination deprives plaintiffs of their First and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983. *Id.* ¶ 39.

Plaintiffs' second cause of action alleges that the City's anti-leafleting ordinance violates plaintiffs' right to equal protection of the laws under the Fourteenth Amendment because it carves out an exception for labor leafleting and it is applied in a such a way as to permit some commercial leafleting. *Id.* ¶ 41. Plaintiffs also allege a violation of the Equal Protection Clause to the extent FSELLC policies contain exceptions for speech or expressive conduct related to labor or other exceptions. *Id.* ¶ 42.

The Ninth Circuit has limited the application of facial constitutional challenges to those statutes or ordinances "directed narrowly and specifically at expression or conduct commonly associated with expression." *See Roulette v. City of Seattle,* 97 F.3d 300, 305 (9th Cir. 1996) (rejecting a facial challenge to Seattle ordinance prohibiting persons from sitting or lying down upon public sidewalk because it did not restrict "forms of conduct integral to, or commonly associated with, expression"). Plaintiffs can entertain a facial challenge to the City ordinances at issue in this case because they are directed at expression or conduct commonly associated with expression. *See* LVMC §§ 10.44.030, 11.68.100(I); *Perry v. Los Angeles Police Dep't,* 121 F.3d 1365 (9th Cir. 1997) (permitting facial challenge to ordinance banning sales and solicitation of donations), *cert. denied,* -- S.Ct. -- ; 1998 WL 37991 (1998). Plaintiffs may also assert a facial challenge to FSELLC's authority pursuant to LVMC § 11.68.100(B) to permit or deny plaintiffs the opportunity to engage in "mall

vending" without applying for and being denied permission because the ordinance allegedly vests FSELLC with unbridled discretion over whether to deny or permit the expressive activity of selling message-bearing merchandise. *See* Complaint ¶¶ 2, 48; *Gaudiya Vaishnava Soc. v. City of San Francisco,* 952 F.2d 1059, 1062 (9th Cir. 1990). Further, "[b]ecause plaintiffs' claims are rooted in the First Amendment, they may arguethe impact of the ordinance[s] on their own expressive conduct, as well as the expressive activities of others." *Perry,* 121 F.3d at 1368.

With respect to the challenged FSELLC policy regarding the placement of tables, racks, chairs, and other similar structures in the Mall, this court held in its previous order that plaintiffs had failed to meet the standard for allowing a facial challenge. LVMC § 11.68.100(H) provides FSELLC with the authority to grant or deny the placement of such structures in the Mall. The plaintiffs cite *One World One Family Now, Inc. v. State of Nevada,* 860 F.Supp. 1457 (D.Nev. 1994), for their contention that this court could make a finding that this licensing scheme could be found unconstitutional *as applied* to them.

c. Forum Analysis

The scope of the government's power to limit speech or other First Amendment activity on public property depends upon the type of forum involved. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44-46 (1983). A fundamental issue in this case was whether the Mall is a traditional public forum, a designated public forum, or a nonpublic forum. In the court's previous order it found that the Mall was a nonpublic forum. *See City of Las Vegas* at

1073-1078. This court found evidence of the City's intent not to designate the Mall as public forum by examining the legislative history of the ordinance creating the Mall, the Mall's purpose and use as a commercial and entertainment facility, and the incompatibility of such use with the expressive activity sought to be limited. See LVMC § 11.68.100 (statement of legislative purpose in creating Mall); *see also General Media Communications, Inc. v. Cohen,* 131 F.3d 273, 285 (2nd Cir. 1997) ("[t]he Supreme Court has recognized that the government's dedication of property to a commercial enterprise is inconsistent with an intent to create a public forum"); *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm'n,* 797 F.2d 552, 555 (8th Cir. 1985) (sports complex was not a public forum because it was a commercial venture by the city constructed to fill need for such a facility and to provide economic benefits to area), *cert. denied,* 479 U.S. 986 (1986); *International Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Authority,* 691 F.2d 155, 161 (3d Cir. 1982) (finding state-owned athletic and racing complex is a commercial venture not intended to be a public forum and upholding solicitation ban because solicitation is counterproductive to its commercial purpose).

In nonpublic forums the government, as the owner of private property, may restrict speech so long as the regulation is reasonable in light of the purposes of the forum and is "not an effort to suppress expression merely because public officials oppose the speaker's view." *See Perry Educ. Assoc.* at 46. Even a complete ban may be imposed where the function of the property would be disrupted by expressive activity. *See Jacobsen v. United States Postal Service,* 993 F.2d 649, 657-58 (9th Cir. 1993). Finding that the Mall is a

nonpublic forum governs the level of scrutiny that applies in evaluating the plaintiffs' claims. In nonpublic forums the classifications need only be rationally related to a legitimate governmental purpose. *See Perry Educ. Ass'n* at 54-55.

d. Government Restriction on Speech

(1) Anti-Leafleting Ordinance

(a) Equal Protection Analysis

In the court's previous order it enjoined the enforcement of LVMC § 11.68.100(I) on equal protection grounds because it contains an exception for "any conduct 'arguably protected' by the National Labor Relations Act." LVMC § 11.68.100; *See City of Las Vegas* at 1079-1081. To be upheld under the Equal Protection Clause, statutory classifications must be rationally related to a legitimate governmental purpose and those affecting fundamental rights must survive strict scrutiny. "When government regulation discriminates among speech-related activities *in a public forum,* the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey,* 447 U.S. at 461-62 (emphasis added) (citing *Police Dep't of City of Chicago v. Mosley,* 408 U.S. 92, 96-97 (1972)). Since this court has ruled that the Mall is a nonpublic forum there is no fundamental First Amendment fight to engage in expressive activities in the Mall. See *Perry Educ. Ass'n,* 460 U.S. at 54-55 (distinguishing *Carey* and *Mosley* because "[t]he key to those decisions...was the presence of a public forum"); *Monterey County,* 812 F.2d at 1200 ("only when rights of access associated with a public forum are improperly

limited may we conclude that a fundamental right is impinged"; thus, the plaintiff could "lay no claim to a fundamental right of access here because the applicable forum is nonpublic"). Thus, the classification need only be rationally related to a legitimate governmental purpose. *Id.*

This court held that the governmental interests advanced by defendants in this case were not rationally related to the distinction between labor leafleting and all other types of leafleting. The City has legitimate interests in maintaining a safe and comfortable atmosphere in the Mall in order to compete with other commercial and entertainment venues by reducing litter, preventing harassment and intimidation of pedestrians, and restricting activities which interrupt pedestrian traffic flow and cause pedestrian congestion. See, e.g., *International Society for Krishna Consciousness v. Lee,* 505 U.S. 672, 683-85 ((traffic flow and pedestrian congestion are legitimate governmental interests); *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805 (1984) (government has valid interest in advancing aesthetic values); cf. *Edenfield v. Fane,* 507 U.S. 761,769 (1993) (protecting public from *commercial* solicitation which intimidates, harasses, or invades the privacy of recipients is a legitimate and important state interest). However, permitting an exception to the leafleting ban for labor leafleting, an activity protected under the National Labor Relations Act, see *Beth Israel Hosp. v. NLRB,* 437 U.S. 483,491-93 (1978), does not rationally advance the City's interests with respect to litter, traffic flow, Or protection of pedestrians from harassment. Cf. *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 418-19 (1993) (applying First Amendment commercial speech analysis and rejecting distinction between news racks distributing newspapers and

those distributing commercial handbills because discrimination against commercial handbills did not "reasonably fit" government's legitimate interests in safety and aesthetics). The only other justification for the labor leafleting exception that was advanced by defendants, that it was necessitated by the federal preemption of state and local law touching upon labor relations, has been rejected by the Supreme Court. See *Mosley,* 408 U.S. at 102 n. 9 (finding that the federal preemption argument does not justify a total ban of nonlabor picketing).

(b) First Amendment Analysis

Before discussing whether the language that offends equal protection should be severed from the ordinance, or whether the ordinance should be found unconstitutional in its entirety, the court will now determine whether the ordinance in unconstitutional on First Amendment grounds. The plaintiffs argue that there are no "problems intrinsic to the act of leafleting that would make it naturally incompatible with a large, multipurpose forum." *See Lee* at 672 (1992). They cite the Supreme Court's decision in *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus,* 482 U.S. 569 (1987), which unanimously struck down a regulation that prohibited "all First Amendment activities" in the Los Angeles International Airport as authority that the ordinance to overbroad. In *Jews for Jesus* the Court found it "obvious that such a ban cannot be justified everi if LAX were a nonpublic forum because no conceivable government interest would justify such an absolute prohibition on speech." *See Id.* at 575.

"The reasonableness of the government's restriction [on speech in a nonpublic forum] must be assessed in light of the

purpose of the forum and all the surrounding circumstances." *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* 473 U.S. 788, 809 (1985). It is important to consider a forum's special attributes in determining the constitutionality of an ordinance since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the forum involved. *See Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51. The Supreme Court has held that a restriction on speech in a nonpublic forum is "reasonable" when it is "consistent with the [government' s] legitimate interest in 'preserving the property...for the use to which it is lawfully dedicated.'" *See Perry, supra,* at 50-51, quoting *Postal Service v. Council of Greenberg Civic Assis.*, 453 U.S. 114 (1981), 129-130.

Applying these standards, this court must look at the ordinance in relation to the purpose of the Mall and the City's interest in preserving that purpose. The City has actual and legitimate interests in preventing pedestrian congestion and interference with pedestrian traffic flow and reducing the risk of fraud and duress. *One World,* 76 F.3d at 1013 (giving deference to city council's determination that government interests were real, not merely conjectural). The City has actual and valid interests in protecting Mall patrons from unwanted intrusions, harassment or intimidation, and limiting disruption to the Mall's commercial purpose and use of attracting visitors and revitalizing the downtown business area.

These interests are particularly significant here because the Mall, unlike an airport or other transportation center, must attract visitors in order to compete with numerous other

shopping and entertainment venues in Las Vegas. Without visitors, the City' s purpose in creating the Mall to revitalize the downtown business area would be compromised and the Mall itself would be in jeopardy economically. In addition, the leafleting ban does not foreclose all channels of communication by plaintiffs because the public sidewalks and streets surrounding the Mall are unquestionably public fora.

The issues concerning the ban on leafleting have some similarities to the issues surrounding the reasonableness of a ban on solicitation, as well as some differences. *See Lee* at 690. Leafleting does not entail all of the problems presented by solicitation. Specifically, "[o]ne need not ponder the contents of a leaflet or pamphlet in order to mechanically take it out of someone's hand... 'The distribution of literature does not require that the recipient stop in order to receive the message the speaker wished to convey; instead the recipient is free to read the message at a later time.'" *See Id.* (quoting *Heffron, supra,* at 665.

The difference between the Mall in question and other multipurpose nonpublic forums, such as an airport, is that the Mall is the attraction itself. The City created the mall with the purpose of revitalizing the downtown area. One obvious problem with leafleting is the litter that it could possibly cause. Nevertheless, when this restriction on speech is viewed in light of the multipurpose function of the Mall it appears to this court to be unreasonable. Plaintiffs should not be able to pass out leaflets in places where pedestrian traffic will be obstructed, but the ordinance in question places a total ban on leafleting which is unreasonable in light of the purpose and use of the Mall and is unconstitutional, *See Lee* at 690; *See*

also Chicago Acorn v. Metropolitan Pier and Exposition, 150 F.3d 695, 703 (7th Cir. 1998).

(2) Anti-Solicitation Ordinance

Because this court has held that the Mall is a nonpublic forum, the constitutionality of the solicitation ordinance must be evaluated as a government restriction on speech in a nonpublic forum. As such, the anti-solicitation ordinance will be upheld under the First Amendment if it is reasonable in light of the purposes of the forum and is not designed to prohibit the activity merely because of disagreement with the views expressed. *Perry Educ. Ass'n,* 460 U.S. at 46. "The restriction 'need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation.'" *Lee,* 505 U.S. at 683 (quoting *Kokinda,* 497 U.S. at 730) (emphasis in original). Moreover, access to a nonpublic forum may be based on topic and speaker identity as long as the distinctions drawn are viewpoint-neutral and reasonably related to the purposes of the forum. *Perry Educ. Ass'n,* 460 U.S. at 49.

(a) Reasonableness Analysis

Plaintiffs contend that the anti-solicitation ordinance places unreasonable restrictions on their First Amendment rights because defendants have not shown that solicitation is incompatible with the commercial and entertainment use of the Mall. In *Lee,* the Supreme Court held that an airport terminal is a nonpublic forum and upheld the ban on solicitation under a reasonableness standard because solicitation activities in an airport are disruptive to the traffic flow of pedestrians and present risks of duress and fraud. 505 U.S. at 683-84. In addition, because pedestrian congestion is

a serious problem for airports, the incremental effects of solicitation activities could prove to be quite disruptive, especially since if the plaintiff was given access, so too must all other religious, nonreligious, and noncommercial organizations. *Id.* at 685. Moreover, the ban was reasonable given the fact that solicitation was permitted on the sidewalks outside of the airport terminal which provided the plaintiff access to a majority of the airport visitors. *Id.* at 684-685. The Supreme Court and other courts have reached similar conclusions regarding solicitation bans on Post Office sidewalks, *Kokinda,* 497 U.S. at 737, in an athletic and racing complex, *New Jersey Sports and Exposition Auth.,* 691 F.2d at 161, and on a tourist beach and bordering sidewalk, *Chad,* 861 F.Supp. at 1061.

As in *Lee,* the City has actual and legitimate interests in preventing pedestrian congestion and interference with pedestrian traffic flow and reducing the risk of fraud and duress. *One World,* 76 F.3d at 1013 (giving deference to city council's determination that govemment interests were real, not merely conjectural). As in *New Jersey Sports and Exposition Auth.* and *Chad,* the City has actual and valid interests in protecting Mall patrons from unwanted intrusions, harassment or intimidation, preventing competition by solicitors for Mall patrons' money, and limiting disruption to the Mall's commercial purpose and use of attracting visitors and revitalizing the downtown business area. *New Jersey Sports and Exposition Auth.,* 691 F.2d at 161 (finding that solicitation is disruptive because it competes with operators of the sports and racing complex for patrons' money and that solicitation ban is a legitimate means of protecting patrons from unwanted intrusions); *Chad,* 861 F.Supp. at 1063 (holding that city had legitimate interest in eliminating

nuisance activity on its famous beach, especially since the beach's rehabilitation and redevelopment as a resort destination played an integral part in city's economic development plans). These interests are particularly significant here because the Mall, unlike an airport or other transportation center, must attract visitors in order to compete with numerous other shopping and entertainment venues in Las Vegas. See, e.g., *New Jersey Sports and Exposition Auth.*, 691 F.2d at 162 (recognizing that solicitation could offend or annoy patrons so much that they will choose in the future to attend other competing, privately-owed Commercial venues).

Without visitors, the City's purpose in creating the Mall to revitalize the downtown business area would be compromised and the Mall itself would be in jeopardy economically. In addition, as in *Lee,* the solicitation ban does not foreclose all channels of communication by plaintiffs because the public sidewalks and streets surrounding the Mall are unquestionably public fora. Plaintiffs complain that Mall patrons, unlike the airport visitors in *Lee,* have alternative ways to enter and exit the Mall through the hotel-casinos bordering the Mall, that the majority of patrons do not use the surrounding public sidewalks for access to the Mall, and that even those who do use those sidewalks are more dispersed and more difficult to reach than they would be inside the Mall. In addition to the lack of evidence showing that the majority of patrons enter and exit the Mall from hotel-casinos, plaintiffs' argument is unpersuasive because *Lee* did not hold that a solicitation ban is reasonable *only* if there is an alternative way to easily reach a *majority* of those persons who could be reached within the nonpublic forum itself. See *Lee,* 505 U.S. at 684-85.

Plaintiffs attempt to distinguish the decision upholding the solicitation ban in *Lee* on the grounds that the challenged restrictions in that case reached "only personal solicitations for immediate payment of money." 505 U.S. at 704. Relying on dicta in Justice Kennedy's concurrence in *Lee,* plaintiffs argue that the anti-solicitation ordinance in this case is overbroad because it bars written or oral requests for funds at some later date, such the distribution of a written request for a donation accompanied by a preprinted envelope. Justice Kennedy stated that a ban on requests for money at some later date, which was not present in *Lee, would be* unreasonable because such solicitations do not involve the same potential for fraud or undue pressure as requests for immediate payment of money. *Id.* at 704-06. Although the plaintiffs' overbreadth argument addresses the governmental interest in reducing the risk of fraud and duress, it does not take into account the incompatibility of any form of solicitation with the commercial and entertainment purposes of the Mall. The legislative history and common sense alike suggest that potential Mall patrons prefer to visit a commercial and entertainment venue where they will not be stopped and harassed by solicitors asking for money, regardless of whether the request is for an immediate donation or a donation in the future. As a result, even this more limited kind of personal solicitation in the Mall would disrupt the City's goal in creating the Mall to attract visitors and revitalize the downtown business area. Thus, a ban on all forms of solicitation is reasonable in light of the Mall's commercial purpose and is a legitimate way to further theCity's interests.

Message bearing leaflets that contain contact numbers in order to receive further information on the message, that do

not contain requests for donations or other support, clearly do not fall within the same category as do solicitors asking for goods, services, patronage or money. LVMC § 10.44.010(A) defines solicitation to mean "to ask, beg, solicit or plead, whether orally, or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage, or gifts of items of value for oneself or another person or organization." Accordingly, the City should not bar persons or organizations who are lawfully exercising their First Amendment rights by distributing message bearing leaflets merely because their leaflets contain contact numbers. It is reasonable for the City to bar the distribution of message bearing leaflets that solicit money or donations, as defined under LVMC § 10.44.010(A), through in hand leafleting, regardless of whether their request is for an immediate or future donation.

(b) Viewpoint Neutral

Because the ordinance imposes a flat ban on solicitation, it does not discriminate on the basis of viewpoint or content. See LVMC §§ 10.44.010(A), 10.44.030(F); *Kokinda,* 497 U.S. at 736. It simply excludes all solicitation activities irrespective of the purpose behind those activities.

(3) FSELLC's Discretion Over Mall Vending

Under LVMC § 11.68.100(B), FSELLC has the authority to permit or deny plaintiffs the opportunity to engage in "mall vending." "Mall vending" is defined as "the distribution, display or sale, or any combination thereof, of consumer goods or services (including food, drink, or merchandise) from a pushcart, concession stand, kiosk or other similar

structure." LVMC § 11.68.020. The sale of message-bearing merchandise is clearly encompassed in this definition of mall vending. FSELLC's regulation of mall vending under LVMC § 11.68.100(B) must "promote the best interests of the public and carry out the provision[s] of the Pedestrian Mall Act" and is "subject to the City's police power, the provisions of the management agreement and other provisions of [Chapter 11.68] and shall not be construed in derogation of the constitutional or statutory rights of any person." See LVMC § 11.68.070(H). Plaintiffs allege that FSELLC has an unconstitutional "policy" of prohibiting plaintiffs from selling message-bearing merchandise in the Mall. Plaintiffs' argument will be construed as a challenge to the constitutionality of LVMC § 11.68.070(B), rather than a FSELLC policy, because that ordinance creates a licensing scheme which provides FSELLC the discretion to deny or permit the expressive activity of *selling* message-bearing merchandise from structures in the Mall.[16]

In Gaudiya v. Vaishnava Soc. v. City of San Francisco, the Ninth Circuit considered a city ordinance which required all individuals, including those hired by charitable organizations, to obtain a peddling permit from the city's police chief before selling merchandise on public streets. The ordinance provided no specific grounds for granting or denying permits but simply stated that the police chief "may" issue a permit. First, the court found that the sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or

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[16] To the extent that plaintiffs seek to "give away" such merchandise to Mall patrons who give them a donation, such conduct is governed by the anti-solicitation ordinance.

ideological message is protected by the First Amendment. 952 F.2d at 1063-65. Second, the court determined that the complete discretion granted to the police chief in denying or granting peddling permits violates the First Amendment because it allows the police chief to discriminate on the basis of content in a public forum. *Id.* at 1065-66.

Although *Gaudiya* and other cases cited by plaintiffs which invalidated licensing schemes involved public forums rather than nonpublic forums, it appears that this licensing scheme violates the lesser standard of allowing reasonable, viewpoint-neutral restrictions on expressive activity in a nonpublic forum. See *Sentinel,* 936 F.2d at 1199-1200 and n.11 (finding neutral criteria must be established in permit scheme governing placement of news racks in nonpublic forum rest areas in order to channel discretion of state officials and ensure decisions are not based on content or viewpoint). For example, because nothing in LVMC § 11.68.100(B) or § 11.68.070 limits FSELLC's discretion to deny permission to sell message-bearing merchandise based on the seller's viewpoint, the licensing scheme cannot be considered viewpoint-neutral. See *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750 (1988) ("a law or policy permitting communication in a certain manner for some but not others raises the specter of content and viewpoint censorship"); cf. also *Gaudiya,* 952 F.2d at 1066 (unfettered discretion to deny a permit application "grants officials the power to discriminate and raises the specter of selective enforcement on the basis of the *content* of the speech") (emphasis added). Thus, LVMC § 11.68.100(B) gives FSELLC unbridled discretion in its authority to permit or deny "mall vending" and is unconstitutional.

In this court's previous order it enjoined the enforcement of LVMC § 11.68.100(B) with respect to the sale of merchandise constituting a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the plaintiff organizations until further order by this court. In has been nearly three years since the issuance of that injunction. During these three years the defendants have not done anything to change the ordinance in order to circumscribe their discretion.

(4) Tables and Structures

LVMC § 11.68.100(H) prohibits the placement of any table or other structure within the Mall except as authorized by the FSELLC for "special events, mail advertising, mall entertainment or mall vending or other commercial an entertainment activities." In its previous order, this court rejected the plaintiffs' claim that the ordinance vests unbridled discretion with the FSELLC holding that they could not assert a facial challenge to an ordinance prohibiting the placement of structures. *See City of Las Vegas* at 1071. Now the plaintiffs wish to assert an as applied challenge to the ordinance. The limited evidence cited in the plaintiffs' motion and affidavits is insufficient to show an as applied claim. The ordinance in question does not give discretion to the managers of the Mall to allow structures in the mall except for certain events enumerated in the ordinance. This ordinance is entirely reasonable in light of Mall's multipurpose use and its need to remain a viable tourist attraction. *See Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 979(9th Cir. 1998).

(5) Alleged Restrictions on Assembly

In its Motion for Summary Judgment, plaintiffs allege that the FSELLC's broad authority given under certain ordinances restricts their rights as individuals in assembling peaceably at the Mall in order to conduct First Amendment Activities. They state even though there are no Ordinances prohibiting them from conducting certain First Amendment activities at the Mall, the FSELLC has "hidden behind the City's skirts and sought to avoid any claim that they have any statutory authority to interfere with the plaintiffs' activities." They state the issue as "under what authority are the defendants acting to prohibit peaceful assembly on Freemont Street and can they do so without violating the plaintiffs' rights." The plaintiffs cite a couple of instances where they believe they were wrongly prohibited from exercising their First Amendment rights. For example, plaintiffs cite an incident that occurred on October24, 2000, where security guards at the Mall prohibited them from setting up a small table to distribute their literature, which is in violation of LVMC § 11.68.100(H). This and the other incidents cited in their motions and affidavits are insufficient to show the need for the sweeping injunction against the City that they ask for in their motion.

III. Conclusion

IT IS ORDERED that plaintiffs' Motion for Summary Judgment (#75) is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that defendants' Countermotion for Summary Judgment (#77) is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that defendants shall be permanently enjoined from enforcing LVMC § 11.68.100(I).

IT IS FURTHER ORDERED that defendants shall be permanently enjoined from enforcing LVMC § 11.68.100(B) against plaintiffs with respect to the sale of merchandise constituting a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the plaintiff organizations.

IT IS FURTHER ORDERED that defendants' Objection and Motion to Strike Plaintiffs' Summary Judgment Evidence (#78) is Granted in part and Denied in part.

Let the judgment be entered accordingly.

DATED: This 30th day of March, 2001.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 98-15853, 98-15970

[Filed February 4, 1999]

AMERICAN CIVIL LIBERTIES UNION; GARY PECK; Unitarian Universalist Social Justice Committee; Paul R. Brown; Shundahai Network; Greg Gable, Plaintiffs-Appellants,

v.

CITY OF LAS VEGAS; Jan Laverty Jones; Fremont Street Limited Liability Corporation; Mark Paris, Defendants-Appellees.

AMERICAN CIVIL LIBERTIES UNION; GARY PECK; Unitarian Universalist Social Justice Committee; Paul R. Brown; Shundahai Network; Greg Gable, Plaintiffs-Appellees,

v.

CITY OF LAS VEGAS; Jan Laverty Jones; Fremont Street Limited Liability

Corporation; Mark Paris,)
Defendants-Appellants.)
)

Appeals from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding
D.C. No. CV-97-01419-DWH/LRL

Before CHOY, NOONAN, and TROTT, Circuit Judges

ORDER[1]

The American Civil Liberties Union of Nevada, Gary Peck, the Unitarian Universalist Social Justice Committee, Paul R. Brown, The Shundahai Network, and Greg Gable (collectively "the ACLU") appeal the district court's partial denial of a preliminary injunction against the City of Las Vegas, Jan Laverty Jones, the Fremont Street Experience Limited Liability Corp., and Mark Paris (collectively "the City") regarding an anti-solicitation ordinance and other policies the ACLU alleges prohibit public expression in violation of the First Amendment. The City cross-appeals the district court's partial grant of a preliminary injunction regarding an anti-leafleting ordinance and a mall vending-licensing scheme challenged by the ACLU on the same grounds.

This court reviews the grant or denial of a preliminary

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

injunction motion for an abuse of discretion. *Children of the Rosary v. Phoenix,* 154 F.3d 972, 975-76 (9th Cir.1998); *Gregorio T. v. Wilson,* 59 F.3d 1002 (9th Cir.1995). The district court's ruling will be upheld unless it was based on an erroneous view of the law or a clearly erroneous assessment of the facts. *Children of the Rosary,* 154 F.3d at 976. To obtain a preliminary injunction, the ACLU must show a likelihood of success on the merits and a possibility of irreparable injury or the existence of serious questions going to the merits and a balance of hardships tipping in movant's favor. *Id.* at 974-75.

The ACLU argues that issues of law arising from a denial of a preliminary injunction are reviewed de novo, relying on *S.O.C., Inc. v. County of Clark,* 152 F.3d 1136, 1142 (9th Cir.1998) and *Foti v. Menlo Park,* 146 F.3d 629, 635 (9th Cir.1998). However, *Clark and Foti* both rely on *Crawford v. Lundgren,* 96 F.3d 380 (9th Cir. 1996), and that reliance is misplaced. *Crawford* was not a preliminary injunction case. In *Crawford,* the court reviewed a declaratory judgment; the preliminary injunction in that case had been dissolved when a permanent injunction was denied and the preliminary injunction was not before the court. *Id.* at 384.

Further, this court has expressly rejected ALCU's argument.

> Although we have previously suggested that issues of law underlying the district court's decision on the preliminary injunction are reviewed de novo ... the Supreme Court has expressly rejected any multitiered standard of review for abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990)

(Rule 11). "Rather, an appellate court should apply an abuse of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* This single-tier formulation of the abuse of discretion standard of review has been subsequently adopted in numerous other contexts. See, e.g., *Koon v. United States,* 518 U.S. 81, --------- ,116 S.Ct. 2035, 2047-48, 135 L.Ed.2d 392 (1996) (sentencing guidelines); *Schlup v. Delo,* 513 U.S. 298, 333, 115 S.Ct. 851, 870, 130 L.Ed.2d 808 (1995) (fundamental miscarriage of justice exception in capital habeas) (O'Connor, J., concurring); *United States v. Morales,* 108 F.3d 1031, 1035 (9th Cir. 1997) (expert testimony); *Osorio v. INS,* 99 F.3d 928, 932 (9th Cir.1996) (grant of asylum); *Flores v. Shalala,* 49 F.3d 562, 567 (9th Cir. 1995) (attorney's fees); *Stock West Corp. v. Taylor,* 964 F.2d 912, 918 (9th Cir. 1992) (comity and abstention in determining tribal court jurisdiction).

Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998) (citation omitted)

Abuse of discretion remains the standard. If the ACLU wants a de novo review of the issues herein, it can appeal the partial denial of summary judgment upon the district court's entry of final judgment in the case.

The ALCU's appeal is therefore DISMISSED. Based on the same reasoning, the City's cross-appeal is also

DISMISSED.

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

CV-S-97-1419-DWH(LRL)

[Filed April 24, 1998]

AMERICAN CIVIL LIBERTIES UNION OF NEVADA, et al.,
Plaintiffs,

v.

CITY OF LAS VEGAS, et al.,
Defendants.

JUDGES: Before: David W. Hagen, U.S. District Judge

ORDER

Plaintiffs' motion (# 21) for a preliminary injunction came before the court for oral argument on February 20, 1998. After reviewing the briefs and evidence submitted by both sides and considering their arguments, the court finds, as discussed more fully below, that plaintiffs have satisfied the test for issuing a preliminary injunction barring the enforcement of Las Vegas Municipal Code ("LVMC") § 11.68.100(I) and the standardless licensing scheme pursuant

to LVMC § 11.68.100(B). Plaintiffs have not shown they are entitled to an order preliminarily enjoining defendants City of Las Vegas ("the City") and Mayor Jan Laverty Jones from enforcing LVMC § 10.44.030(F) and defendants Fremont Street Limited Liability Corporation ("FSELLC") and Mark Paris, executive director of FSELLC, from enforcing any FSELLC policies or regulations which infringe on plaintiffs' First Amendment rights. Also before the court is defendants' motion (# 18) to dismiss, or in the alternative, for summary judgment.

I. Factual and Procedural Background

The Fremont Street Experience Mall (the "Mall") was created by the City pursuant to the Pedestrian Mall Act, N.R.S. § 268.810 et seq. See LVMC § 11.68.010 *et seq.* It was intended to provide an attraction to compete with the Strip and bring tourists and business back to the sagging downtown casinos and businesses. See LVMC § 11.68.010. The City contracted with FSELLC, a private entity, to construct, operate and maintain the Mall. LVMC § 11.68.060. FSELLC has principal control over all commercial uses and aspects of the property. See LVMC § 11.68.070. Although downtown casinos contributed $25 million to the Mall's initial building costs of $70 million, FSELLC is solely responsible for paying the Mall's operation and maintenance expenses of approximately $6 million to $10 million annually. Defendants' Opp., Exh. B ¶ 15.

Construction on the Mall began in September 1994 and the Mall opened in December 1995. Defendants' Motion to Dismiss ("Defendants' Motion"), Exh. D ¶ 5. The Mall spans a five-block length of what used to be Fremont Street before

Fremont Street was closed and the street and its sidewalks demolished and excavated. Defendants' Opp., Exh. B ¶ 5. It also includes cul-de-sac areas on First and Third Streets in which the sidewalks and streets were closed and demolished. *Id.* After the existing streets and sidewalks were demolished, holes were dug for columns to support the ten-story "celestial superstructure" which was installed over the Fremont Street area. Defendants' Motion, Exh. D ¶ 5. A fifty-foot wide strip of special high-strength concrete was poured over the area. *Id.* It was coated, stained and formed into a pattern designed to guide pedestrian traffic flow. *Id.* In addition, underground utilities systems, a special irrigation system, and sound and lighting systems were installed in the Mall complex to facilitate the use of retail carts and kiosks, to service landscaping, and to accommodate special events and activities. *Id.* ¶¶ 6-7.

Plaintiffs filed their complaint (# 1) for declaratory and injunctive relief on October 9, 1997, alleging that certain City ordinances and FSELLC policies infringe on their First Amendment rights. In particular, plaintiffs challenge the prohibition of the distribution of literature or other written material at the Mall pursuant to LVMC § 11.68.100(I), the prohibition against the solicitation of funds at the Mall pursuant to LVMC § 10.44.030, and all other FSELLC-imposed restrictions on public education or protest activities pursuant to contract or LVMC § 11.68.100. The challenged provision in LVMC § 10.44.030 was enacted in January 1995. Defendants' Motion, Exh. G at 12. The challenged provision in LVMC § 11.68.100 was enacted in August 1995. Defendants' Motion, Exh. F.

On January 9, 1998, defendants FSELLC and Mark Paris moved (# 18) to dismiss plaintiffs' complaint, or in the alternative, for summary judgment. Defendants City of Las Vegas and Mayor Jones joined (# 16) in that motion. On January 20, 1998, plaintiffs filed this motion (# 21) for preliminary injunction. In the motion for preliminary injunction, plaintiffs seek an order enjoining defendants from enforcing the following ordinances or policies on the premises of the Mall: (1) LVMC § 11.68(100)(1) (prohibiting distribution of literature or other written material); (2) LVMC § 10.44.030 (prohibiting solicitation of funds); and (3) all other FSELLC-imposed restrictions on plaintiffs' free speech rights.

II. Analysis

A. Defendants' Objections to Plaintiffs' Evidence

1. Newspaper Articles

Defendants object to the admissibility of newspaper articles submitted by the plaintiffs in support of their motion for a preliminary injunction. The first article is a letter to the editor from the Mayor of Las Vegas, Jan Laverty Jones, published in the Las Vegas Review Journal on April 16, 1997. Plaintiffs' Motion, Exh. 1. Plaintiffs rely on Mayor Jones' characterization of the Mall as the "Town Square" to support their argument that the Mall is a public forum. See Plaintiffs' Motion at 8.

The other three newspaper articles from the Las Vegas Review-Journal are cited as support for the following factual statement in plaintiffs' memorandum: "At the request of city

officials in 1993, the Las Vegas Convention and Visitors Authority designated the Fremont Street Experience a recreation facility, which allowed the city to receive $8 million from the Tourism Authority over eight years." Plaintiffs' Motion at 3, Exhs. 2(a), 2(b), 2(c). Two of the three articles also quote Mark Paris' description of the Mall as "a great gathering place" and his statement that "there are no swings or fields, but it is a great venue to enjoy the Las Vegas climate, special events and one another's company" and that "it's parochial thinking to think of a park as a field or baseball diamond." Plaintiffs' Motion, Exh. 2(a)s, 2(b). Plaintiffs rely on this description to support their argument that the Mall is a public forum. See Reply at 9-10.

Defendants contend that these newspaper articles cannot be admitted for purposes of proving the truth of the statements made by Mayor Jones and Mr. Paris because those out-of-court statements published in the newspaper constitute double-hearsay. Plaintiffs contend that the out-of-court statements by Mayor Jones and Mr. Paris are not hearsay pursuant to Fed.R.Evid. 801(d)(2) because they are statements of party opponents. Further, plaintiffs argue that the publication of these statements have the requisite level of reliability to invoke Fed.R.Evid. 803(24) and also meet the requirements of Fed.R.Evid. 804(b)(5)[1] given the reporters' unavailability to testify if they invoke the Nevada Shield Law, N.R.S. § 49.275.

Although the statements by Mayor Jones and Mr. Paris

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[1] Fed.R.Evid. 803(24) and 804(b)(5), the residual exceptions to the hearsay rule, were transferred to the new rule 807, effective December 1, 1997.

are not hearsay because they are admissions of party opponents in their official capacities, the repetition of those statements in newspaper articles and a published letter to the editor does constitute hearsay. See *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991). Moreover, plaintiffs have failed to show that these statements satisfy the requirements of Fed.R.Evid. 807. The rule requires that "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence." Fed.R.Evid. 807. As the Ninth Circuit recognized in *Larez*, statements quoted in newspaper articles fail to satisfy the best evidence requirement of subsection (B) because testimony from reporters or editors themselves regarding what Mayor Jones and Mr. Paris said or wrote would have been better evidence. *Larez*, 946 F.2d at 644. Although plaintiffs attempt to invoke the Nevada Shield Law as a justification for failing to obtain affidavits from or present testimony of the newspaper reporters and editors who interviewed Mr. Paris or read Mayor Jones' original letter to the editor, the privilege under that law was waived as to the content and source of the quoted statements because the content and source were published. See *Las Vegas Sun, Inc. v. Eighth Judicial Dist. Court*, 104 Nev. 508, 513, 761 P.2d 849 (1988) ("disclosure of a source and the attribution of remarks to that source is a clear cut waiver of the shield privilege as to that name and those statements"). Accordingly, this court will not consider the statements of Mayor Jones and Mr. Paris in the newspaper articles and letter to the editor in adjudicating plaintiffs' preliminary injunction motion.

The court will also disregard as hearsay the discussion in the newspaper articles of the Las Vegas Convention and Visitors Authority's designation of the Mall as a recreation facility in order to receive funds from the Tourism Authority. The statements in the articles regarding this fact constitute hearsay because they are offered for the truth of the matter asserted. They do not fall within the residual exception of Fed.R.Evid. 807 because there are other sources of admissible evidence regarding these facts (such as public records) and plaintiffs failed to make reasonable efforts to obtain such admissible evidence. See Fed.R.Evid. 807(B).

2. Affidavits

Defendants also object to the affidavits of Gary Peck, Greg Gable, and Paul R. Brown submitted in support of plaintiffs' preliminary injunction motion on the basis that they merely recite legal conclusions or conclusory opinions and are not based on personal knowledge. Plaintiffs appear to ignore defendants' argument about the admissibility of the affidavits, addressing only the issue of whether a court may decide a motion for preliminary injunctions solely on the basis of affidavits.

Affidavits must be based on personal knowledge and must not contain conclusions of law or ultimate facts. See *Kim v. United States*, 121 F.3d 1269, 1276-77 (9th Cir. 1997) (rejecting affidavit no based on personal knowledge); *A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 121 (6th Cir. 1981) (finding conclusions of law in affidavit were not entitled to any weight). "When ultimate facts or conclusions appear in an affidavit which also contains the proper subject of affidavit testimony, facts within the

personal knowledge of the affiant, the extraneous material should be disregarded and only the facts considered." *A.L Pickens*, 650 F.2d at 121. Defendants seek to strike the portion of the Brown affidavit in which he declares that he was informed by Gary Peck that certain protest activities are not permitted in the Mall because it is not based on personal knowledge of which activities are prohibited. Defendants are correct that Mr. Brown is not competent to make such a statement and it will be disregarded by the court.

Defendants also object to other portions of all of the affidavits concerning the characteristics of the Mall because those statements constitute ultimate facts and conclusions of law. Specifically, defendants seek to have stricken the following statements describing the Mall as: "a unique and essential forum for engaging in protest activities because of its function as a central gathering place" (Peck Aff. ¶ 5); "a unique and effective forum" (Gable Aff. ¶ 5); and "the quintessential forum for protesting" (Brown Aff. ¶ 6). Because whether or not the Mall is a public forum is a central legal issue in this case, the opinions of these declarants regarding this legal issue will be disregarded and only the facts underlying their opinions will be considered by the court. Likewise, the extent to which the disputed ordinances and FSELLC policies fail to leave alternative channels of communication open is a legal question and declarants' opinions regarding that issue will not be considered.

Finally, defendants argue that because plaintiffs may not rely upon the submitted newspaper articles, their only evidence consists of affidavits and preliminary injunctions should not issue on the basis of affidavits alone. Although courts should be wary of granting a preliminary injunction

based "solely on allegations and conclusory affidavits submitted by plaintiff," see *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1575 (Fed. Cir. 1990) (applying Ninth Circuit law), there is no bar to issuing an injunction on the basis of affidavits alone. See *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 555 (9th Cir. 1986) (affirming issuance of preliminary injunction on basis of affidavits alone where defendant did not request opportunity to present oral testimony and magnitude of inquiry would make evidentiary hearing impractical).

3. Evidence Submitted with Reply Brief

In addition to the newspaper articles and three affidavits, plaintiffs submitted new evidence with their reply, including interrogatory responses, fifty-five photographs, and a supplemental affidavit from Gary Peck. Defendants object to this evidence because they argue that it was not submitted in response to any issue raised in defendants' opposition. Rather, defendants contend that plaintiffs knew that they planned to submit this evidence at the time of filing of their motion but waited until filing their reply brief to submit it in order to sand-bag the defendants.

When new evidence is submitted with a reply brief, the court should not consider the new evidence without giving the non-moving party an opportunity to respond. See *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (allowing plaintiff to submit supplemental declaration in response to defendants' new evidence in their reply), *cert. denied*, 139 L. Ed. 2d 14, 118 S. Ct. 48 (1997). Because this court issued a minute order (# 43) allowing defendants an opportunity to

respond with their own evidence, defendants' objection on the delay in plaintiffs submission of this evidence is no longer valid.

B. Plaintiffs' Preliminary Injunction Motion

1. Preliminary Injunction Standard

"The basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982). Every request for injunctive relief is different, and in every case "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987).

The Ninth Circuit requires a plaintiff seeking a preliminary injunction to show either a combination of probable success on the merits and the possibility of irreparable harm, or the existence of serious questions as to the merits and that the balance of hardships tips sharply in plaintiff's favor. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991).

These tests are essentially the same, representing "a continuum of equitable discretion whereby the greater of the relative hardship to the moving party, the less probability of success must be shown." *Regents of Univ. of Calif. v. American Broadcasting Companies, Inc.*, 747 F.2d 511, 515 (9th Cir. 1984). Likewise, the required degree of irreparable

harm decreases as the probability of success increases. See *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993). Moreover, "in cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citations omitted).

As to the anti-leafleting ordinance and the licensing scheme governing mall vending, plaintiffs have established a likelihood of success on the merits and a possibility of irreparable harm. With respect to the anti-solicitation ordinance and challenged FSELLC policies, however, plaintiffs have failed to show that they will probably succeed on the merits, or that there are serious questions as to the merits *and* the balance of hardships tips sharply in their favor.

2. Likelihood of Success on the Merits or Serious Questions as to the Merits

Plaintiffs' action for declaratory and injunctive relief consists of two claims. Plaintiffs' first cause of action alleges that defendants' conduct in enforcing certain City ordinances and FSELLC policies deprives plaintiffs of their First and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983. Complaint (# 1) ¶¶ 36-39. Plaintiffs allege that the City's anti-solicitation and anti-leafleting ordinances are unconstitutional on their face and as applied to plaintiffs. *Id.* ¶ 38. Further, plaintiffs allege that to the extent FSELLC policies allow plaintiffs to engage in First Amendment activities only on a permit or request basis, the lack of standards governing FSELLC's discretion in making this determination deprives plaintiffs of their First and Fourteenth

Amendment rights in violation of 42 U.S.C. § 1983. *Id.* ¶ 39.

Plaintiffs' second cause of action alleges that the City's anti-leafleting ordinance violates plaintiffs' right to equal protection of the laws under the Fourteenth Amendment because it carves out an exception for labor leafleting and it is applied in a such a way as to permit some commercial leafleting. *Id.* ¶ 41. Plaintiffs also allege a violation of the Equal Protection Clause to the extent FSELLC policies contain exceptions for speech or expressive conduct related to labor or other exceptions. *Id.* ¶ 42.

In their reply brief, plaintiffs appear to limit their constitutional challenge to FSELLC policies (at least for purposes of their preliminary injunction motion) to those policies regulating the placement of tables, racks, chairs or similar structures and the distribution of message-bearing merchandise in the Mall under LVMC § 11.68.100(B) and (H). See Reply at 20 n.9 and 21 (stating that plaintiffs "take the FSELLC defendants at their word that picketing, carrying banners, collecting signatures, and the like are not proscribed" by FSELLC policies). Thus, the court will only consider plaintiffs' challenge to those specific FSELLC policies and no others.

The Ninth Circuit has limited the application of facial constitutional challenges to those statutes or ordinances "directed narrowly and specifically at expression or conduct commonly associated with expression." *Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996) (rejecting a facial challenge to Seattle ordinance prohibiting persons from sitting or lying down upon public sidewalk because it did not restrict

"forms of conduct integral to, or commonly associated with, expression"). Plaintiffs can entertain a facial challenge to the City ordinances at issue in this case because they are directed at expression or conduct commonly associated with expression. See LVMC §§ 10.44.030, 11.68.100(I); *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365 (9th Cir. 1997) (permitting facial challenge to ordinance banning sales and solicitation of donations), *cert. denied*, 140 L. Ed. 2d 511, 118 S. Ct. 1362, 1998 WL 37991 (1998). Plaintiffs may also assert a facial challenge to FSELLC's authority pursuant to LVMC § 11.68.100(B) to permit or deny plaintiffs the opportunity to engage in "mall vending" without applying for and being denied permission because the ordinance allegedly vests FSELLC with unbridled discretion over whether to deny or permit the expressive activity of selling message-bearing merchandise. See Complaint ¶¶ 2, 48; *Gaudiya Vaishnava Soc. v. City of San Francisco*, 952 F.2d 1059, 1062 (9th Cir. 1990). Further, "because plaintiffs' claims are rooted in the First Amendment, they may argue the impact of the ordinance[s] on their own expressive conduct, as well as the expressive activities of others." *Perry*, 121 F.3d at 1368.

With respect to the challenged FSELLC policy regarding the placement of tables, racks, chairs, and other similar structures in the Mall, plaintiffs fail to meet the standard for allowing a facial challenge. LVMC § 11.68.100(H) provides FSELLC with the authority to grant or deny the placement of such structures in the Mall. However, plaintiffs do [**19] not allege that this authority constitutes unbridled discretion over whether to deny or permit *expressive activity* because the placement of structures is not "conduct commonly associated with expression." Although *One World One Family Now, Inc. v. State of Nevada*, 860 F. Supp. 1457 (D.Nev. 1994), held

that a licensing scheme regarding placement of tables on public sidewalks was unconstitutional *as applied* to plaintiffs who sought to use such tables to sell their message-bearing merchandise, plaintiffs have failed to show that FSELLC's policy regarding the placement of structures has been applied to them in connection with the sale of message-bearing merchandise. Thus, plaintiffs have failed to show that they would likely succeed in making a facial or as applied challenge to the FSELLC policy governing the placement of tables, racks, chairs or similar structures on the Mall.

In considering whether plaintiffs are likely to succeed or have raised serious questions as to the merits of their other facial and "as applied" challenges, this court must determine the type of forum at issue and whether the ordinances or FSELLC policies have placed legitimate restrictions on constitutionally-protected speech or expressive conduct in that particular forum. *Id.* (facial challenge); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir. 1993) ("as applied" challenge), *cert. denied*, 510 U.S. 915, 126 L. Ed. 2d 253, 114 S. Ct. 306. Merely claiming a First Amendment violation does not provide a sufficient basis for injunctive relief. See *One World One Family Now v. City & County of Honolulu,* 76 F.3d 1009, 1016 (9th Cir. 1996), *cert. denied*, 519 U.S. 1009, 136 L. Ed. 2d 403, 117 S. Ct. 554 (1996).

a. Forum Analysis

The scope of the government's power to limit speech or other First Amendment activity on public property depends upon the type of forum involved. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). A fundamental issue in this case

is whether the Mall is a traditional public forum, a designated public forum, or a nonpublic forum. If it is a public forum, the right to limit expressive activity is "sharply circumscribed" by the First Amendment. *Id.* at 45. In a traditional public forum, the government may enforce (1) content-based restrictions if necessary to serve a compelling state interest and if narrowly drawn to achieve that end and (2) content-neutral time, place and manner restrictions if narrowly tailored to serve a significant state interest and if they leave open alternative channels of communication. *Id.* The same standards govern a designated public forum which is public property opened by the government as a place for expressive activity. *Id.* at 45-46. If the Mall is a nonpublic forum, then the government, as the owner of private property, may restrict speech so long as the regulation is reasonable in light of the purposes of the forum and is "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46. Even a complete ban may be imposed where the function of the property would be disrupted by expressive activity. *Jacobsen v. United States Postal Service*, 993 F.2d 649, 657-58 (9th Cir. 1993).

Forum analysis also governs the level of scrutiny applied in evaluating plaintiffs' equal protection challenge to the anti-leafleting ordinance. If the Mall is a traditional or designated public forum and the ordinance discriminates among speech-related activities, then the classifications are subject to strict scrutiny. *Carey v. Brown*, 447 U.S. 455, 461-62, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). If the Mall is a nonpublic forum, then the classifications need only be rationally related to a legitimate governmental purpose. See *Perry Educ. Ass'n*, 460 U.S. at 54-55; *Monterey County*, 812 F.2d 1194 at 1200.

(1) Traditional Public Forums

The Supreme Court has defined a traditional public forum as property that has as "a principal purpose . . . the free exchange of ideas" and has "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985) and *Hague v. Committee for Indus. Organizations*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939)). Using history and traditional use as guiding principles to determine the nature of the forum, courts have found the category of traditional public fora to include public parks, streets and sidewalks.[2] *Frisby v. Schultz*, 487 U.S. 474, 480-81, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988) (residential sidewalks are public fora); *United States v. Grace*, 461 U.S. 171, 179-80, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983) (sidewalks outside of U.S. Supreme Court building are public fora); *Perry Educ. Ass'n*, 460 U.S. at 45 (streets and parks are public fora). Other types of public

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[2] However, not all public sidewalks are traditional public fora. See *United States v. Kokinda*, 497 U.S. 720, 727-29, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) (plurality) (sidewalk leading from parking lot to Post Office is not a public forum); *Monterey County*, 812 F.2d at 1197 (same); *Chad v. City of Fort Lauderdale*, 861 F. Supp. 1057, 1061 (S.D. Fla. 1994) (sidewalk built within last two years bordering public beach is not a traditional or designated public forum).

property, although open to public use, such as airports, streets and sidewalks of military bases, and interstate rest areas, are not traditional public fora because they have not historically been available for public expression and their principal purpose has not been to promote "the free exchange of ideas." *Lee*, 505 U.S. at 680-83 (neither traditional use nor principle purpose of modern air terminals indicate that they are public fora); *Greer v. Spock*, 424 U.S. 828, 834-38, 47 L. Ed. 2d 505, 96 S. Ct. 1211 (1976) (streets and sidewalks of military bases are not public fora); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1203-04 (11th Cir. 1991) (interstate rest areas are "modern creations" which do not meet the definition of traditional public fora).

Even the nature of public property which falls within the definition of a traditional public forum can be changed or its uses altered to such an extent that it no longer retains its public forum status. See, e.g., *Hale v. Department of Energy*, 806 F.2d 910, 915-16 (9th Cir. 1986) (public roadway is not a public forum because "land containing this roadway has been withdrawn from public use for the purpose of nuclear testing" and "its use for expressive, as well as nonexpressive activity, by the public is limited"). However, the government cannot change the forum status of public property by fiat. See *Grace*, 461 U.S. at 180 (government may not destroy the traditional forum status of public property simply by declaring it to be a nonpublic forum). As Justice Kennedy recognized in his concurrence in *Lee*:

> In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use. Otherwise the State would be prohibited

> from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require. The difference is that when property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property, and bear attendant costs, to change the property's forum status.

505 U.S. at 699-700.

Plaintiffs contend that the Mall is a public forum because transforming a five-block stretch of public streets and sidewalks into a pedestrian mall which resembles "one large sidewalk" does not change the status of the property as a traditional public forum. Defendants, on the other hand, argue that the Mall is not a traditional public forum because its principle purpose is not promoting public expression and it is not a public street nor sidewalk nor park but rather a modern commercial and entertainment facility.

To support their position that the Mall is a traditional public forum, plaintiffs rely that the language of the Pedestrian Mall Act, N.R.S. § 268.810 *et seq.*, and Las Vegas Municipal Code Chapter 11.68 *et seq.* pursuant to which the Mall was created. Section 268.811(3) of the Pedestrian Mall Act defines the term "pedestrian mall" in part as: "an area including portions of one or more *streets* or alleys that has been set aside for use primarily by pedestrians and to which access by motor vehicles is prohibited or restricted." (Emphasis added). Given this language, plaintiffs contend that the Mall is no more than a stretch of Fremont Street which has been closed to motorized traffic and that it

is not a newly created entity. Plaintiffs also note that there is no requirements of improvements to the streets or sidewalks to fit within the definition of a pedestrian mall and that the City ordinance which created the Mall also indicates that it is comprised of streets and sidewalks.[3] According to plaintiffs, the fact that the streets and sidewalks were ripped out and replaced with high-strength patterned concrete does not change the nature of the Mall as a public forum. Likewise, they argue that the metal canopy which stretches over part of the Mall and displays a "part-time" light show cannot convert the streets and sidewalks into a nonpublic commercial and entertainment facility.

The court is unpersuaded by this argument. Although the Pedestrian Mall Act defines pedestrian malls as streets or alleys which have been set aside for pedestrian use and does not require any improvement of such streets, the Act does not prevent or preclude municipalities from transforming the physical character and use of those streets to such an extent as change the property's constitutional forum status from traditional public fora to nonpublic fora. Nor is the court's

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[3] Section 11.68.040(A) of the Las Vegas Municipal Code sets forth the legal description of the Mall as follows:

> The following *streets* and rights-of-way as constituting and comprising the Pedestrian Mall are legally described in Exhibit A attached to this ordinance codified in this Chapter and which is adopted herein as part of this Chapter.

(Emphasis added). "Street" is defined in another section of the LVMC as "all that area dedicated to public use for public street purposes and shall include, but not be limited to, roadways, parkways, alleys, and sidewalks." LVMC § 13.24.020 (F).

analysis of this issue aided by the fact that LVMC § 11.68, the specific City ordinance creating the Mall, describes the public property on which the Mall was constructed in terms of the particular streets (and parallel sidewalks) encompassed by the project. It was simply an easy way for the City to describe the boundaries of the Mall project and does not require the conclusion that the public forum status of the property was retained despite the changes to its physical character and use. In fact, the City ordinance creating the Mall supports defendants' position that the Mall is not a traditional public forum. For example, LVMC § 11.68.010 indicates that the City created the Mall for the principal purpose of restoring the economic growth and vitality of downtown area businesses by providing a pedestrian mall for the "movement, safety, convenience, enjoyment, entertainment, recreation and relaxation of pedestrians," not for the purpose of promoting expression. See *Lee*, 505 U.S. at 682; Cornelius, 473 U.S. at 800.

Other "undisputed facts" relied upon by plaintiffs to argue that the Mall retains is original status as a traditional public forum include the nature of the Mall as a public thoroughfare that is contiguous on all sides to public streets, the lack of barriers to pedestrian entry or movement, the existence of public streets that run through parts of the Mall, and the use of public funds for the construction and maintenance of the Mall.[4] According to plaintiffs, given these characteristics, if

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[4] Because plaintiff's evidence of the Las Vegas Convention Authority's designation of the Mall as a "recreational facility" and statements of defendants Mayor Jones and Mr. Paris will not be considered on this motion, that evidence cannot support plaintiffs' claim that the Mall has the characteristics of a traditional or

changed at all, the property in dispute has been transformed into one large sidewalk, a traditional public forum, and not into a modern commercial and entertainment facility. Plaintiffs cite *Gerritsen v. City of Los Angeles* to support their argument that the City has attempted to assert broad control over speech or expressive activities in the Mall by fiat without changing the traditional public forum status of the property.[5]

In *Gerritsen*, city officials sought to restrict speech by prohibiting all hand billing in an one area of a downtown park. The area of the park covered by the hand billing ban, known as Olvera Street, contains a plaza area with an open-air bandstand as well as restaurants, outdoor vendors, shops, a church, and the Mexican Consulate. 994 F.2d at 572, 576. The city argued that the hand billing ban should be upheld because Olvera Street is distinct from the rest of the park (which they conceded was a public forum) given its unique historic and cultural atmosphere which is designed to foster commercial exchange. The court rejected the city's argument because Olvera Street "is still part of the park and it is

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designated public forum held open for expressive activity.

[5] Plaintiffs also cite to *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365 (9th Cir. 1997), which found a city ordinance banning sales and solicitation of donations along the Venice Beach boardwalk to be facially unconstitutional. However, *Perry* is unhelpful to plaintiffs argument because there was *no* dispute in that case concerning the public forum status of the Venice Beach boardwalk. *Id.* at 1368. Likewise, in other cases cited by plaintiffs, *Rohman v. City of Portland*, 909 F. Supp. 767, 772 (D. Or. 1995), and *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1161 (6th Cir. 1993), this issue was also undisputed.

indistinguishable from other sections in terms of visitors' expectations of its public forum status." *Id.* at 576. In reaching its conclusion, the court relied the Supreme Court cases of *Boos v. Barry* and *United States v. Grace*,[6] which support the proposition that when a subsection of a public forum is indistinguishable from the larger, undisputed public forum in which it exists, it is one and the same with the larger public forum. *Id.*

Gerritsen is distinguishable from this case because the property at issue in *Gerritsen* was a historical area within a public park which itself was admittedly a public forum and there had been no alteration of the physical character or use of the Olvera Street section of the park to indicate that its status as a public forum had changed.[7] In contrast, the

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[6] *Boos v. Barry*, 485 U.S. 312, 318, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988), treated public sidewalks surrounding the Soviet and Nicaraguan embassies no differently from other public sidewalks. *Grace* held that sidewalks surrounding the United States Supreme Court building are indistinguishable from other public sidewalks. 461 U.S. at 179-80.

[7] Other cases relied upon by plaintiffs are likewise distinguishable. In *Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir. 1993), the Ninth Circuit rejected the argument that a pavilion in a city park was a designated public forum instead of a traditional public form because the pavilion was part of a public park which is unquestionably a traditional public forum and because the city made no effort to limits its use. In dicta, the court did express "grave doubts about the City's ability, should it so choose, to withdraw the [pavilion] from its status as a traditional public forum." *Id.* However, by citing *United States v. Grace* in support of its statement, the court indicated that only an attempt to change the

physical character and use of the public property now encompassed by the Mall has been changed at great expense to the City and the City's private partners in the Mall venture. Formerly consisting of public streets and sidewalks whose traditional use included public expression, the purpose and use of the Mall today is revitalization of the downtown business area by promoting commercial activity in a safe, convenient, relaxing pedestrian environment and by providing entertainment to draw visitors and tourists to the area. Moreover, unlike the sidewalks in *Boos* and *Grace* which bordered nonpublic forum property but were identical to the surrounding public forum sidewalks, the physical characteristics of the Mall clearly distinguish it from the surrounding streets and sidewalks. In contrast to the uncovered, unadorned public streets and sidewalks surrounding the Mall, a 10-story metal canopy hangs over the Mall floor and displays light shows nightly accompanied by music from the speakers throughout the Mall. Cf. *Jacobsen,* 993 F.2d at 657 (noting that portion of a sidewalk under overhang of Post Office building was nonpublic forum federal property and was distinguishable from public forum municipal

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forum status by governmental *ipse dixit*, and not by transforming the physical character and use of the property, would be doubtful. See *id. In Citizens to End Animal Suffering And Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, 75-76 (D. Mass. 1990), the court found that the public property at issue, pedestrian lanes in the Faneuil Hall area in Boston, was a traditional public forum or at least a designated public forum because "the entire Faneuil Hall area has long been a center for public debate and expression" and the lease to defendant contained the express condition that defendant maintain its historic public character. No such condition was contained in the ordinance creating the Mall.

sidewalks near the Post Office). In addition, the distinctive pattern, color and texture of the single-level floor of the Mall as well as the special lighting, benches, landscaping, and kiosks all provide notice to visitors that they have entered a special enclave which is separate and distinct from the surrounding public forum areas. See *Lee*, 505 U.S. at 680 ("separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction"); *Grace*, 461 U.S. at 179-80 (distinguishing the sidewalks surrounding the U.S. Supreme Court building in *Grace* from the sidewalks located within an enclosed military base in *Greer* because there was "no indication whatever to persons . . . that they have entered some special type of enclave").

(2) Designated Public Forums

A designated public forum can be created only "by intentionally opening a nontraditional public forum for public discourse." *Lee*, 505 U.S. at 679-80 (quoting *Cornelius*, 473 U.S. 788 at 802). Neither government inaction nor permitting members of the public to freely visit a place owned or operated by the Government creates a designated public forum. *Id.* In determining government intent, the court considers the government's purpose in creating the forum as reflected by the "policy and practice of the government" and "the nature of the property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 802. However, "selective access, unsupported by evidence of purposeful designation for public use, does not create a public forum." *Id.* at 805.

In the alternative to its traditional public forum argument,

plaintiffs argue that the Mall is a designated public forum because defendants have opened the Mall up to expressive First Amendment activity. As evidence of this designation, plaintiffs rely solely upon representations made by defendants in this proceeding that speech and other activities protected by the First Amendment, other than solicitation or in-hand distribution of literature, are allowed in the Mall, except to the extent they may be regulated by generally applicable ordinances or state statutes. See Reply at 7 (citing Defendants' Opposition at 12 and Exh. A thereto (Paris Decl.) ¶ 9, 10, 12). Because defendants have not specifically restricted other types of expressive activity by ordinance, such as demonstrating, carrying banners, placards or pickets, and collecting signatures, plaintiffs claim that defendants have opened up the Mall to public discourse and that it must be treated as a designated public forum. Plaintiffs cite *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975) and *Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054, 85 L. Ed. 2d 480, 105 S. Ct. 2115 (1985), in support of their argument. Both *Southeastern Promotions* and *Cinevision* are distinguishable because the government in those cases sought to restrict the content of theatrical or musical performances which could be presented at a municipally-owned amphitheater or theater. Yet, these public facilities were designed for, dedicated to, and opened up for very *same* expressive activities, performing music and plays, that the government later sought to restrict based on content. See 420 U.S. at 555; 745 F.2d 560 at 570-71.

Here, in contrast, the City passed ordinances restricting certain types of expressive activities, solicitation and hand billing, in the Mall at the outset of the Mall's development.

Yet plaintiffs argue that by failing to restrict *all* types of expressive activity, the City demonstrated its intent to create a public forum. This argument flies in the face of the principles recognized by the Supreme Court in *Lee* and *Kokinda* that the government does not create a designated public forum by inaction, by freely allowing the public to visit the property, or by permitting some speech activities. *Lee,* 505 U.S. at 679-80; *Kokinda*, 497 U.S. at 729 (practice of allowing leafleting and picketing on postal premises does "not add up to the dedication of postal property to speech activities"); see also *Perry Educ. Ass'n*, 460 U.S. at 47 ("selective access does not transform government property into public forum").

Rather than inferring intent from inaction, one can find evidence of the City's intent not to designate the Mall as public forum by examining the legislative history of the ordinance creating the Mall, the Mall's purpose and use as a commercial and entertainment facility, and the incompatibility of such use with the expressive activity sought to be limited. See LVMC § 11.68.100 (statement of legislative purpose in creating Mall); Defendants' Motion, Exh. G (legislative history of anti-solicitation ordinance including evidence of incompatibility of solicitation with Mall's purpose); see also *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 285 (2nd Cir. 1997) ("the Supreme Court has recognized that the government's dedication of property to a commercial enterprise is inconsistent with an intent to create a public forum"); *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm'n*, 797 F.2d 552, 555 (8th Cir. 1985) (sports complex was not a public forum because it was a commercial venture by the city constructed to fill need for such a facility and to provide economic benefits to area), *cert. denied*, 479

U.S. 986, 93 L. Ed. 2d 579, 107 S. Ct. 576 (1986); *International Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d 155, 161 (3d Cir. 1982) (finding state-owned athletic and racing complex is a commercial venture not intended to be a public forum and upholding solicitation ban because solicitation is counterproductive to its commercial purpose). In light of these factors, plaintiffs cannot show that they will likely succeed in proving that the City intended to designate the Mall as a public forum. See *Cornelius*, 473 U.S. at 803; *Planned Parenthood*, 941 F.2d 817 at 825.

b. Government Restriction on Speech

(1) Anti-Leafleting Ordinance

Before considering plaintiffs' First Amendment challenge to the City's anti-leafleting ordinance, this court will address their claim that this ordinance violates equal protection because it contains an exception for "any conduct 'arguably protected' by the National Labor Relations Act." LVMC § 11.68.100. To be upheld under the Equal Protection Clause, statutory classifications must be rationally related to a legitimate governmental purpose and those affecting fundamental rights must survive strict scrutiny. "When government regulation discriminates among speech-related activities *in a public forum*, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey*, 447 U.S. at 461-62 (emphasis added) (citing *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96-97, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972)). Here, plaintiffs have not shown

that they would succeed in proving the Mall is a public forum and there is no fundamental First Amendment right to engage in expressive activities in a nonpublic forum. See *Perry Educ. Ass'n*, 460 U.S. at 54-55 (distinguishing *Carey* and *Mosley* because "the key to those decisions . . . was the presence of a public forum"); *Monterey County*, 812 F.2d 1194 at 1200 ("only when rights of access associated with a public forum are improperly limited may we conclude that a fundamental right is impinged"; thus, the plaintiff could "lay no claim to a fundamental right of access here because the applicable forum is nonpublic"). Thus, the classification need only be rationally related to a legitimate governmental purpose. *Id.*

The governmental interests advanced by defendants in this case are not rationally related to the distinction between labor leafleting and all other types of leafleting. The City has legitimate interests in maintaining a safe and comfortable atmosphere in the Mall in order to compete with other commercial and entertainment venues by reducing litter, preventing harassment and intimidation of pedestrians, and restricting activities which interrupt pedestrian traffic flow and cause pedestrian congestion. See, e.g., *Lee*, 505 U.S. at 683-85 (traffic flow and pedestrian congestion are legitimate governmental interests); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (government has valid interest in advancing aesthetic values); cf. *Edenfield v. Fane*, 507 U.S. 761, 769, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993) (protecting public from *commercial* solicitation which intimidates, harasses, or invades the privacy of recipients is a legitimate and important state interest). However, permitting an exception to the leafleting ban for labor leafleting, an activity protected under the National Labor Relations Act, see

Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491-93, 57 L. Ed. 2d 370, 98 S. Ct. 2463 (1978), does not rationally advance the City's interests with respect to litter, traffic flow, or protection of pedestrians from harassment. Cf. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-19, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993) (applying First Amendment commercial speech analysis and rejecting distinction between news racks distributing newspapers and those distributing commercial handbills because discrimination against commercial handbills did not "reasonably fit" government's legitimate interests in safety and aesthetics). The only other justification for the labor leafleting exception advanced by defendants, that it was necessitated by the federal preemption of state and local law touching upon labor relations, has been rejected by the Supreme Court. See *Mosley*, 408 U.S. at 102 n.9 (finding that the federal preemption argument does not justify a total ban of nonlabor picketing).

Because plaintiffs have shown that they would likely succeed on the merits of their equal protection challenge to the anti-leafleting ordinance, the court need not reach the merits of plaintiffs' First Amendment challenge to that ordinance.

(2) Anti-Solicitation Ordinance

Because plaintiffs have failed to demonstrate that they would likely succeed in proving the Mall is a traditional or designated public forum, the constitutionality of the solicitation ordinance must be evaluated as a government restriction on speech in a nonpublic forum. As such, the anti-solicitation ordinance will be upheld under the First

Amendment if it is reasonable in light of the purposes of the forum and is not designed to prohibit the activity merely because of disagreement with the views expressed.[8] *Perry Educ. Ass'n*, 460 U.S. at 46. "The restriction 'need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.'" *Lee*, 505 U.S. at 683 (quoting *Kokinda*, 497 U.S. 720 at 730) (emphasis in original). Moreover, access to a nonpublic forum may be based on topic and speaker identity as long as the distinctions drawn are viewpoint-neutral and reasonably related to the purposes of the forum. *Perry Educ. Ass'n*, 460 U.S. at 49.

(a) Reasonableness Analysis

Plaintiffs contend that the anti-solicitation ordinance places unreasonable restrictions on their First Amendment rights because defendants have not shown that solicitation is incompatible with the commercial and entertainment use of the Mall. In *Lee*, the Supreme Court held that an airport terminal is a nonpublic forum and upheld the ban on solicitation under a reasonableness standard because solicitation activities in an airport are disruptive to the traffic flow of pedestrians and present risks of duress and fraud. 505 U.S. at 683-84. In addition, because pedestrian congestion is a serious problem for airports, the incremental effects of solicitation activities could prove to be quite disruptive,

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[8] Because plaintiffs fails to offer any evidence that the anti-solicitation ordinance is not enforced against the hotel-casinos and other businesses along the Mall, the court will not consider plaintiffs' equal protection challenge to that ordinance based upon selective enforcement. See Defendants' Opp., Exh. B (Paris Aff.) ¶ 8.

especially since if the plaintiff was given access, so too must all other religious, nonreligious, and noncommercial organizations. *Id.* at 685. Moreover, the ban was reasonable given the fact that solicitation was permitted on the sidewalks outside of the airport terminal which provided the plaintiff access to a majority of the airport visitors. *Id.* at 684-685. The Supreme Court and other courts have reached similar conclusions regarding solicitation bans on Post Office sidewalks, *Kokinda*, 497 U.S. at 737, in an athletic and racing complex, *New Jersey Sports and Exposition Auth.*, 691 F.2d at 161, and on a tourist beach and bordering sidewalk, *Chad,* 861 F. Supp. at 1061.

As in *Lee*, the City has actual and legitimate interests in preventing pedestrian congestion and interference with pedestrian traffic flow and reducing the risk of fraud and duress. See Defendants' Motion, Exh. G at 1 (specifically identifying these interests in the full text of the ordinance adopted by the City Council); *One World*, 76 F.3d at 1013 (giving deference to city council's determination that government interests were real, not merely conjectural). As in *New Jersey Sports and Exposition Auth.* and *Chad*, the City has actual and valid interests in protecting Mall patrons from unwanted intrusions, harassment or intimidation, preventing competition by solicitors for Mall patrons' money, and limiting disruption to the Mall's commercial purpose and use of attracting visitors and revitalizing the downtown business area. See Defendants' Motion, Exh. G; *New Jersey Sports and Exposition Auth.*, 691 F.2d at 161 (finding that solicitation is disruptive because it competes with operators of the sports and racing complex for patrons' money and that solicitation ban is a legitimate means of protecting patrons from unwanted intrusions); *Chad*, 861 F. Supp. at 1063

(holding that city had legitimate interest in eliminating nuisance activity on its famous beach, especially since the beach's rehabilitation and redevelopment as a resort destination played an integral part in city's economic development plans). These interests are particularly significant here because the Mall, unlike an airport or other transportation center, must attract visitors in order to compete with numerous other shopping and entertainment venues in Las Vegas. See, e.g., *New Jersey Sports and Exposition Auth.*, 691 F.2d at 162 (recognizing that solicitation could offend or annoy patrons so much that they will choose in the future to attend other competing, privately-owed commercial venues).

According to testimony of numerous witness, written surveys, letters, and other documentation presented to the City Council, solicitation activities in the Mall would disrupt the comfortable environment that the Mall seeks to maintain for its patrons and that disruption would in turn cause visitors, tenants, and corporate sponsors of the Mall to go elsewhere or deter them from coming to the Mall in the first instance. See Defendants' Motion, Exh. G. Without visitors, the City's purpose in creating the Mall to revitalize the downtown business area would be compromised and the Mall itself would be in jeopardy economically.

In addition, as in *Lee*, the solicitation ban does not foreclose all channels of communication by plaintiffs because the public sidewalks and streets surrounding the Mall are unquestionably public fora. Plaintiffs complain that Mall patrons, unlike the airport visitors in *Lee*, have alternative ways to enter and exit the Mall through the hotel-casinos bordering the Mall, that the majority of patrons do not use the

surrounding public sidewalks for access to the Mall, and that even those who do use those sidewalks are more dispersed and more difficult to reach than they would be inside the Mall. In addition to the lack of evidence showing that the majority of patrons enter and exit the Mall from hotel-casinos, plaintiffs' argument is unpersuasive because *Lee* did not hold that a solicitation ban is reasonable *only* if there is an alternative way to easily reach a *majority* of those persons who could be reached within the nonpublic forum itself. See *Lee*, 505 U.S. at 684-85.

Plaintiffs attempt to distinguish the decision upholding the solicitation ban in *Lee* on the grounds that the challenged restrictions in that case reached "only personal solicitations for immediate payment of money." 505 U.S. at 704. Relying on dicta in Kennedy's concurrence in *Lee*, plaintiffs argue that the anti-solicitation ordinance in this case is overbroad because it bars written or oral requests for funds at some later date, such the distribution of a written request for a donation accompanied by a preprinted envelope. Kennedy stated that a ban on requests for money at some later date, which was not present in *Lee, would be* unreasonable because such solicitations do not involve the same potential for fraud or undue pressure as requests for immediate payment of money. *Id.* at 704-06. Although the plaintiffs' overbreadth argument addresses the governmental interest in reducing the risk of fraud and duress, it does not take into account the incompatibility of any form of solicitation with the commercial and entertainment purposes of the Mall. The legislative history and common sense alike suggest that potential Mall patrons prefer to visit a commercial and entertainment venue where they will not be stopped and harassed by solicitors asking for money, regardless of

whether the request is for an immediate donation or a donation in the future. See Defendants' Motion, Exh. G. As a result, even this more limited kind of personal solicitation in the Mall would disrupt the City's goal in creating the Mall to attract visitors and revitalize the downtown business area. Thus, a ban on all forms of solicitation is reasonable in light of the Mall's commercial purpose and is a legitimate way to further the City's interests.

(b) Viewpoint Neutral

Because the ordinance imposes a flat ban on solicitation, it does not discriminate on the basis of viewpoint or content. See LVMC §§ 10.44.010(A), 10.44.030(F); *Kokinda*, 497 U.S. at 736. It simply excludes all solicitation activities irrespective of the purpose behind those activities.

(3) FSELLC's Discretion Over Mall Vending

Under LVMC § 11.68.100(B), FSELLC has the authority to permit or deny plaintiffs the opportunity to engage in "mall vending." "Mall vending" is defined as "the distribution, display or sale, or any combination thereof, of consumer goods or services (including food, drink, or merchandise) from a pushcart, concession stand, kiosk or other similar structure." LVMC § 11.68.020. The sale of message-bearing merchandise is clearly encompassed in this definition of mall vending. FSELLC's regulation of mall vending under LVMC § 11.68.100(B) must "promote the best interests of the public and carry out the provision[s] of the Pedestrian Mall Act" and is "subject to the City's police power, the provisions of the management agreement and other provisions of [Chapter

11.68] and shall not be construed in derogation of the constitutional or statutory rights of any person." See LVMC § 11.68.070(H). Plaintiffs allege that FSELLC has an unconstitutional "policy" of prohibiting plaintiffs from selling message-bearing merchandise in the Mall. Plaintiffs' argument will be construed as a challenge to the constitutionality of LVMC § 11.68.070(B), rather than a FSELLC policy, because that ordinance creates a licensing scheme which provides FSELLC the discretion to deny or permit the expressive activity of *selling* message-bearing merchandise from structures in the Mall.[9]

In *Gaudiya Vaishnava Soc. v. City of San Francisco*, the Ninth Circuit considered a city ordinance which required all individuals, including those hired by charitable organizations, to obtain a peddling permit from the city's police chief before selling merchandise on public streets. The ordinance provided no specific grounds for granting or denying permits but simply stated that the police chief "may" issue a permit. First, the court found that the sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message is protected by the First Amendment. 952 F.2d at 1063-65. Second, the court determined that the complete discretion granted to the police chief in denying or granting peddling permits violates the First Amendment because it allows the police chief to discriminate on the basis of content in a public forum. *Id.* at 1065-66.

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[9] To the extent that plaintiffs seek to "give away" such merchandise to Mall patrons who give them a donation, such conduct is governed by the anti-solicitation ordinance.

Although *Gaudiya* and other cases cited by plaintiffs which invalidated licensing schemes involved public forums rather than nonpublic forums, it appears that this licensing scheme violates the lesser standard of allowing reasonable, viewpoint-neutral restrictions on expressive activity in a nonpublic forum. See *Sentinel*, 936 F.2d at 1199-1200 and n.11 (finding neutral criteria must be established in permit scheme governing placement of news racks in nonpublic forum rest areas in order to channel discretion of state officials and ensure decisions are not based on content or viewpoint). For example, because nothing in LVMC § 11.68.100(B) or § 11.68.070 limits FSELLC's discretion to deny permission to sell message-bearing merchandise based on the seller's viewpoint, the licensing scheme cannot be considered viewpoint-neutral. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988) ("a law or policy permitting communication in a certain manner for some but not others raises the specter of content and viewpoint censorship"); cf. also *Gaudiya*, 952 F.2d at 1066 (unfettered discretion to deny a permit application "grants officials the power to discriminate and raises the spectre of selective enforcement on the basis of the *content* of the speech") (emphasis added). Thus, plaintiffs are likely to succeed in their facial challenge to the licensing scheme created by LVMC § 11.68.100(B).

3. Irreparable Harm, Balance of Hardships and Public Interest

Because plaintiffs have shown that they would likely succeed on the merits of their challenge to the anti-leafleting ordinance and the ordinance creating a licensing scheme governing sale of message-bearing merchandise, a preliminary injunction is warranted if they show a possibility of irreparable harm. *Gilder*, 936 F.2d at 422. Because the "loss of First Amendment rights, even for a short time, constitutes irreparable injury" and the anti-leafleting ordinance and the ordinance creating a licensing scheme governing the sale of message-bearing merchandise unquestionably limits plaintiffs' ability to engage in expressive activities, there is clearly the possibility of irreparable harm in this case. See *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); see also *Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983) (applying *Elrod*). Thus, plaintiffs have met their burden on their preliminary injunction motion with respect to these ordinances.

However, plaintiffs have *not* shown that they would likely succeed on the merits of their challenge to anti-solicitation ordinance and FSELLC policies. Thus, in order for a preliminary injunction to issue against the enforcement of that ordinance, plaintiffs must demonstrate that the balance of hardships tips sharply in their favor. *Gilder*, 936 F.2d at 422. Plaintiffs have not met this requirement. Although the irreparable harm of the loss of First Amendment rights is well recognized, it does not always outweigh other interests or hardships. See *Hale*, 806 F.2d at 918 (finding plaintiffs' First Amendment claim did not outweigh government's interests in safety and security of nuclear testing site; plaintiffs' inability to demonstrate in a nonpublic forum was not a hardship where nearby public forum provided an alternative channel of communication). Here, the City's interest in maintaining the

safe and comfortable environment in the Mall to attract visitors and revitalize the downtown business area is at least as important as plaintiffs' interest in soliciting in the Mall and may outweigh it. Cf. *Chad*, 861 F. Supp. at 1064 (city's interest in maintaining safe "tourist zone" in nonpublic forum outweighs plaintiff's interest in soliciting, begging or panhandling on tourist beach). The public interest in the economic success of the Mall venture as well as in maintaining an attractive environment for commercial and entertainment activities is advanced by the denial of a preliminary injunction which would bar the enforcement of the anti-solicitation ordinance in the Mall. In contrast, the public interest in safeguarding First Amendment rights is not as strong where the public property at issue is a nonpublic forum, rather than a traditional or designated public forum.

Moreover, plaintiffs seek a preliminary injunction from this court three months after filing their complaint in this case and over two years after the Mall opened. Such a delay "implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Publ'g Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (plaintiff's long delay before seeking a preliminary injunction was one of three reasons for court's finding that plaintiff failed to sustain its burden of proving irreparable injury). Plaintiffs' delay also undermines plaintiffs' assertion of immediate, irreparable harm because plaintiffs are seeking a *change* in the status quo; *i.e.*, an order enjoining the enforcement of a City ordinance which was enacted three years ago in 1995. See *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1092 n. 27 (3rd Cir. 1984) ("the district court may legitimately think it suspicious that the party who asks to preserve the status quo through interim relief has allowed the status quo to change through

unexplained delay"); see also *3570 East Foothill Blvd, Inc. v. City of Pasadena*, 912 F. Supp. 1257, 1267 (C.D. Cal. 1995), *aff'd*, 99 F.3d 1147 (9th Cir. 1996) (finding that enjoining city from enforcing adult business zoning ordinance would be especially harmful because such a radical change from the status quo would occur without any public comment, time for legislative deliberation, or opportunity to study the secondary effects).

Thus, plaintiffs are unable to show that the balance of hardships tips sharply in their favor with respect to the anti-solicitation ordinance and FSELLC policies, and their motion to preliminary enjoin the enforcement of that ordinance and those policies will be denied.

C. Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment

Because defendants have presented material outside the complaint as part of a motion to dismiss, their motion will be treated as one for summary judgment. Fed.R.Civ.P. 12(b); *Skyberg v. United Food & Commercial Workers Int'l Union*, 5 F.3d 297, 302 n. 2 (8th Cir. 1993).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, *Zoslaw v. MCA Distr. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085, 76 L. Ed.

2d 349, 103 S. Ct. 1777 (1983), and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970); *Baker v. Centennial Ins. Co.*, 970 F.2d 660, 662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

> There is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id. at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 60 L. Ed. 2d 241, 99 S. Ct. 1790 (1979). Moreover, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587,

89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *California Architectural Bldg. Products v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006, 98 L. Ed. 2d 650, 108 S. Ct. 698 (1988).

For the reasons stated above in the court's ruling on plaintiffs' preliminary injunction motion, defendants' motion for summary judgment will be denied with respect to the anti-leafleting ordinance and the ordinance creating a standard less licensing scheme governing mall vending. In addition, because the facts are disputed regarding whether any FSELLC policies exist which infringe on plaintiffs' First Amendment rights to engage in activities such as demonstrating, speech making, and protesting, summary judgment is precluded on plaintiffs' challenge to these alleged policies, except with respect to the alleged policy regarding the placement of tables, racks, chairs or similar structures. Compare 2/13/98 Peck Aff. (filed with Reply) ¶¶ 4-5 with Defendants' Supplemental Affidavits, Exh. A (Aff. of Kristin B. McMillan) ¶¶ 8-9.

As to plaintiffs' challenge to the anti-solicitation ordinance, defendants are entitled to summary judgment. For the reasons discussed above, the Mall is a nonpublic forum and the solicitation ban is viewpoint-neutral and reasonable in light of the commercial purpose of the Mall. Thus, the solicitation ban does not violate the First Amendment. *Perry Educ. Ass'n*, 460 U.S. at 46. Plaintiffs have failed to raise a genuine issue of material fact regarding the anti-solicitation ordinance. For example, on the question of the forum status of the Mall, there is no dispute about the facts surrounding the construction or the physical character or use of the Mall, but only the legal conclusions which should be drawn from such

facts. With respect to the question of reasonableness, plaintiffs have also failed to point to any disputed facts, but simply argue that the ban is overbroad to the extent it encompassed requests for donations to be made at some future time. Plaintiffs offer no facts to support this argument and cite instead to dicta in Kennedy's concurrence in *Lee*. This is insufficient to defeat summary judgment.[10]

Similarly, defendants are entitled to summary judgment on plaintiffs' challenge to FSELLC's alleged policy or permit system regarding the placement of tables, racks, chairs, and other similar structures in the Mall. Even if FSELLC has unbridled discretion in using its authority pursuant to LVMC § 11.68.100(H) to grant or deny permission to place such structures in the Mall, plaintiffs cannot assert a facial challenge to this policy or permit system because plaintiffs do not allege nor could they prove that the placement of structures alone is "conduct commonly associated with expression." See *Roulette*, 97 F.3d at 305. Moreover, plaintiffs have failed to produce any evidence that this policy or permit system has been applied to any of them in connection with any expressive activities such as the sale of message-bearing merchandise. Cf. *One World*, 860 F. Supp. at 1462-64 (concluding that a strong likelihood exists that the plaintiffs' use of tables to sell message-bearing merchandise should be characterized as expressive and holding licensing scheme regarding placement of tables on public sidewalks unconstitutional *as applied* to plaintiffs). Thus, plaintiffs' challenge to the FSELLC policy or permit system governing

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[10] Moreover, plaintiffs' reference, in a footnote in their opposition brief, to the need for additional discovery fails to satisfy Fed.R.Civ.P. 56(f).

the placement of tables, racks, chairs or similar structures on the Mall must fail as a matter of law.

III. Conclusion

IT IS ORDERED that plaintiffs' motion (# 21) for a preliminary injunction is GRANTED in part and DENIED in part. Defendants shall be enjoined from enforcing LVMC § 11.68.100(I) until further order by this court. Defendants shall also be enjoined from enforcing LVMC § 11.68.100(B) against plaintiffs with respect to the sale of merchandise constituting a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the plaintiff organizations until further order by this court.

IT IS FURTHER ORDERED that defendants' summary judgment motion (# 18) is GRANTED in part and DENIED in part as described above.

DATED: This 21st day of April, 1998.

/s/_____
David W. Hagen
UNITED STATES DISTRICT JUDGE

APPENDIX G

TITLE 21. CITIES AND TOWNS

CHAPTER 268. POWERS AND DUTIES COMMON TO CITIES AND TOWNS INCORPORATED UNDER GENERAL OR SPECIAL LAWS

PEDESTRIAN MALLS

268.810. Legislative declaration

The legislature hereby finds and declares that:

1. Increases in the population and usage of motor vehicles in the areas of densest population in this state have created conditions of traffic congestion in business districts that:

(a) Constitute a hazard to the safety of pedestrians and impede the movement of police and fire equipment, ambulances and other emergency vehicles;

(b) Indicate a need to widen streets that currently have both sidewalks to accommodate pedestrians and lanes for motor vehicles extending from the buildings on one side of the street to the buildings on the other side of the street leaving no space available for expansion of the area for pedestrians or motor vehicles; and

(c) Warrant the closure of certain streets and other thoroughfares to private vehicles.

2. There has been a progressive decline in the economic growth and vitality of businesses located in the business

districts in the areas of densest population in this state that:

(a) Is attributable to the decrease in tourists and other visitors to these business districts;

(b) Necessitates special efforts to promote economic growth and revitalization of these economically depressed business districts to create new jobs and maintain existing employment opportunities, attract new businesses, tourists and visitors to these districts and to prevent further decline by restoring the economic growth and vitality of these business districts; and

(c) Makes it of particular local benefit to allow municipalities experiencing such economic decline to create pedestrian malls and, if necessary, to raise money for the annual costs of operating, managing, maintaining or improving them through the levy of assessments upon the property or the imposition of fees on the businesses which benefit from the return of tourists and other visitors to the area resulting from the pedestrian mall.

3. It is in the best interests of the state to encourage municipalities to create pedestrian malls to enhance and improve their local business climates and that selecting and contracting with a private entity for the acquisition, construction, improvement, operation, management or maintenance of pedestrian malls, or any combination thereof may also be in the best interests of the public.

4. It is the public policy of the State of Nevada to permit the governing body of any densely populated municipality to protect the public welfare and health and the interests of the public in the safe and effective movement of persons and to preserve and enhance the function and appearance of the business districts of municipalities and to promote the

economic growth and revitalization thereof by the adoption of the ordinances authorized by NRS 268.810 to 268.823, inclusive. (1993, ch. 368, § 2, p.1172.)

Effective date.— This section became effective July 1, 1993.

268.811. Definitions

As used in NRS 268.810 to 268.823, inclusive, unless the context otherwise requires:

1. "Governing body" means the governing body of a city whose population is 300,000 or more.

2. "Operating entity" means a public operating entity of a pedestrian mall or a private operating entity with whom a governing body has contracted for the acquisition, construction, improvement, operation, management or maintenance of a pedestrian mall, or any combination thereof.

3. "Pedestrian mall" means an area including portions of one or more streets or alleys that has been set aside for use primarily by pedestrians and to which access by motor vehicles is prohibited or restricted. The term includes all improvements and appurtenances thereto that are designed to be used primarily for the movement, safety, convenience, enjoyment, entertainment, recreation or relaxation of pedestrians.

4. "Redevelopment agency" means a governmental entity created pursuant to NRS 279.382 to 279.685, inclusive, or a legislative body which has elected to exercise the powers granted to an agency under NRS 279.382 to 279.685, inclusive. (1993, ch. 368, § 3, p. 1173)

Editor's note. — The reference "NRS 279.382 to

279.680" in subsection 4 was changed to "NRS 279.382 to 279.685" by the Legislative Counsel.

Effective date. — This section became effective July 1, 1993.

268.812. Creation of pedestrian mall by ordinance; requirements for consideration and adoption of ordinance; notice required for adoption of ordinance.

1. The governing body of an incorporated city whose population is 200,000 or more may by ordinance create a pedestrian mall.

2. Before adopting an ordinance creating a pedestrian mall, the governing body must find that it would be in the best interests of the city and beneficial to the owners of adjacent property to use the street or streets or other thoroughfare or thoroughfares primarily for pedestrians.

3. The ordinance must establish the boundaries of the pedestrian mall and the governing body may change the boundaries by ordinance. The area included within a pedestrian mall may be contiguous or noncontiguous.

4. In addition to other requirements for the consideration and adoption of an ordinance, at least 10 days before the date fixed for a public hearing on the adoption of the ordinance creating a pedestrian mall, a notice of the date, time and place of the hearing and a copy of the proposed ordinance, or notification that a copy is available in the office of the city clerk, must be mailed to the owners of record of the property included within the proposed boundaries of the pedestrian mall. The names and addresses of the owners of such property may be obtained from the records of the county

assessor or from such other source or sources as the governing body deems reliable. Any such list of names and addresses appertaining to any pedestrian mall may be revised from time to time, but such a list need not be revised more frequently than at 12-month intervals.

5. Unless otherwise provided by the governing body in the ordinance, all property of the city that is used in conjunction with or as a part of the pedestrian mall remains property of the city and must not be considered vacated for any purpose. (1993, ch. 368, § 4, p. 1173.)

Effective date. — This section became effective July 1, 1993.

268.813. Provisions which may be included in ordinance creating pedestrian mall.

An ordinance creating a pedestrian mall may include any provision which is necessary or appropriate to carry out the provisions of NRS 268.810 to 268.823, inclusive, including, without limitation:

1. A prohibition on the use by motor vehicles of the portion of each street or other thoroughfare necessary for the pedestrian mall.

2. Exceptions to such a prohibition for use by emergency, maintenance, utility, mass transit and other necessary vehicles.

3. Provisions for issuing permits to the owners or occupants of property that abuts the pedestrian mall for use of a closed street or thoroughfare for deliveries at such times as are deemed appropriate.

4. Provisions imposing a fee for the use of all or a portion of the pedestrian mall for special events or activities

to offset the cost of operating and maintaining the pedestrian mall.

5. Provisions for the use of the pedestrian mall for advertising purposes and the charging of a fee in connection therewith. (1993, ch. 368, § 5, p. 1174.)

Effective date. — This section became effective July 1, 1993.

268.814. Duties of governing body after adoption of ordinance creating pedestrian mall.

1. Upon the adoption of an ordinance creating a pedestrian mall, the governing body shall:

(a) Appoint an advisory board for the pedestrian mall consisting of at least seven persons, a majority of whom are owners or occupants of property abutting the pedestrian mall, to advise the governing body in connection with the acquisition, construction, improvement, operation, management or maintenance of the pedestrian mall, or any combination thereof;

(b) Assign the responsibility for the acquisition, construction, improvement, operation, management or maintenance of the pedestrian mall, or any combination thereof to an existing part of city government, a redevelopment agency or a public operating entity created by the governing body for this purpose; or

(c) Select and contract with a private operating entity for the acquisition, Construction, improvement, operation, management or maintenance of the pedestrian .mall, or any combination thereof. Such a contract or contracts must be treated as professional services contracts and are not subject to the limitations of subsection i of NRS 354.626. The term of any such contract or c0ntractsmay

extend beyond the terms of office of the members of the governing body.

2. The governing body may include in the ordinance creating the pedestrian mall a provision for any combination of the options set forth in subsection 1.

3. A redevelopment agency or part of city government to which responsibilities are assigned pursuant to paragraph (b) of subsection 1 is a public operating entity for the purposes of NRS 268.810 to 268.823, inclusive, unless the context otherwise requires.

4. If the ordinance creating a public operating entity for the purposes of paragraph (b) of subsection 1 does not provide that the entity is a public entity separate from the city government, the entity is a part of the city government for all purposes, including, withbut limitation, its employees are employees of the city government for all purposes.

5. Notwithstanding any other provision of NRS, a private operating entity is not a political subdivision, local government, public body, governmental agency or entity, establishment of the government, public corporation or quasi public corporation for any purpose. (1993, ch. 368, § 6, p. 1174.)

Effective date. — This section became effective July 1, 1993.

268.815. Pedestrian mall exempt from certain legal requirements governing sidewalks, streets or other thoroughfares.

1. A pedestrian mall is exempt from any provision of law providing standards or specifications for the composition, construction, layout, size and any other component of sidewalks, streets or other thoroughfares and any regulations

adopted pursuant thereto.

2. The governing body may include in an ordinance creating a pedestrian mall or otherwise adopt design or architectural standards, safety standards and other provisions for the regulation of the area included in a pedestrian mall that are different than those adopted for other areas of the city. (1993, ch. 368, § 7, p. 1175.)

Effective date. — This section became effective July 1, 1993.

268.816. Acquisition of property for pedestrian mall by eminent domain

1. A governing body may acquire property for a pedestrian mall by eminent domain pursuant to the provisions of chapter 37 of NRS.

2. For the purposes of chapters 37 and 244A of NRS, the acquisition, construction, improvement, operation, management and maintenance of a pedestrian mall are hereby declared to be public purposes.

3. For the purposes of chapter 244A of NRS, a pedestrian mall shall be deemed to be a recreational facility. (1993, ch. 368,§ 8, p. 1175.)

Effective date. — This section became effective July 1, 1993.

268.817. Authorized uses of pedestrian mall; control and regulation of mall by governing body.

1. A pedestrian mall may be used for any purpose that will enhance the movement, safety, convenience, enjoyment, entertainment, recreation or relaxation of pedestrians, and other purposes necessary or appropriate to carry out the

provisions of NRS 268.810 to 268.823, inclusive, including, without limitation, seating, merchandising, exhibiting, advertising and any other use, activity or special event which in the judgment of the governing body or operating entity will accomplish any of those purposes.

2. The governing body may control or regulate or authorize the control or regulation of:

(a) The distribution and location of movable furniture, sculpture, devices to control pedestrian traffic, landscaping and other facilities that are incidental to the pedestrian mall;

(b) The uses to be permitted or restricted on the pedestrian mall by occupants of abutting property, any transit or telephone utility, concessionaires, vendors, newspaper vending machines and others to serve the convenience and enjoyment of pedestrians and the location of such uses;

(c) The raising of revenue through the imposition of a fee for the use of all or a portion of the pedestrian mall for special events or activities to offset the cost of operating and maintaining the pedestrian mall;

(d) The use of the pedestrian mall for advertising purposes and the charging of a fee in connection therewith;

(e) The operation of any lighting, heating or other facilities, in the pedestrian mall;

(f) The replacement of any landscaping and maintenance of the furniture and facilities in the pedestrian mall;

(g) The access to the pedestrian mall by the public and closure of the pedestrian mall to the public for purposes of special events or activities for limited periods of time;

(h) The use of the pedestrian mall for parades and

other similar activities; and

(i) Other activities, actions or conduct to promote the best interests of the public and carry out the provisions ofNRS 268.810 to 268.823, inclusive. (1993, ch. 368, § 9, p. 1175.)

Effective date. — This section became effective July 1, 1993.

268.818. Powers of operating entity.

In addition to any other powers, the operating entity may:

1. Unless otherwise limited by ordinance or by an agreement with the governing body:

(a) Adopt rules for the management of its affairs and the performance of its functions and duties;

(b) Employ such persons as may be required to carry out its duties and fix and pay their compensation from the money available to pay the expenses of the entity;

(c) Apply for or otherwise solicit, accept, administer and comply with any requirements of any appropriations of money or any gifts, grants or donations of property or money;

(d) Make and execute agreements which may be necessary or convenient to the exercise of the powers and functions of the operating entity, including contracts with any person, firm, corporation, governmental agency or other entity, except that before any such agreement may bind the city in any way, the governing body must specifically approve the agreement;

(e) Administer and manage its own money and pay its

own obligations;

(f) Enforce the conditions of any loan, grant, sale or lease made by the entity;

(g) Publicize the pedestrian mall and the businesses that are located within the pedestrian mall; and

(h) Recruit new businesses to fill vacancies and balance the combination of types of businesses in and around the pedestrian mall.

2. If specifically approved by the governing body:

(a) Fund or assist in the funding of the costs of improving the exterior appearance of property that abuts the pedestrian mall through grants or loans made to the owner or occupant of the property;

(b) Fund the rehabilitation of property that abuts the pedestrian mall;

(c) Accept, purchase, rehabilitate, sell, lease or manage any property that abuts the pedestrian mall, with the consent of the owner;

(d) Provide security, sanitation and other services for the property that abuts the pedestrian mall that are in addition to the services ordinarily provided by the city; and

(e) Acquire, construct or otherwise provide improvements that are designed to increase the safety or attractiveness of the pedestrian mall to businesses which may wish to locate there or to visitors to the mall, including, without limitation, cleanup and control of litter, landscaping, parking areas and facilities, recreational and rest areas and facilities pursuant to any applicable regulations of the governing body. (1993, ch. 368, § 10, p. 1176.)

Effective date. — This section became effective July 1, 1993.

268.819. Certain structures, facilities or activities related to pedestrian mall deemed not to constitute trespass, nuisance, unlawful obstruction or condition; limitation of liability.

1. Notwithstanding any rule, regulation, common law doctrine or principle of law to the contrary, the movable furniture, structures, facilities and appurtenances or activities in conjunction with or located or permitted in the pedestrian mall may not be found to be a trespass or nuisance or an unlawful obstruction or condition.

2. The city, the governing body, an operating entity and any person acting pursuant to a permit issued by the City or the operating entity in conjunction with the acquisition, construction, improvement, operation, management or maintenance of the pedestrian mall are not liable for any injury to a person or to property arising out of the location or use of any such movable furniture, structures, facilities and appurtenances or activities located or permitted in the pedestrian mall, in the absence of gross negligence in the placement, maintenance or operation of any such furniture, structure, facility or appurtenance or activity. (1993, ch. 368, § 11, p. 1176.)

Effective date. — This section became effective July 1, 1993.

268.820. Cost of operation, management, maintenance and improvement of pedestrian mall: Operating entity to report estimation of cost to governing body; special assessment of property owners; offsets; collection of assessment.

If the governing body determines that it is necessary to raise money for the annual cost of operating, managing, maintaining or improving the pedestrian mall:

1. The governing body shall adopt an ordinance creating a district. In addition to other requirements for the consideration and adoption of such an ordinance, at least 10 days before the date fixed for a public hearing on the adoption of the ordinance creating the district, a notice of the date, time and place of the hearing and a copy of the proposed ordinance, or notification that a copy is available in the office of the city clerk, must be mailed to the owners of record of the property included within the proposed boundaries of the district. The names and addresses of the owners may be obtained from the records of the county assessor or from such other source or sources as the governing body deems reliable. Any such list of names and addresses appertaining to the district may be revised from time to time, but such a list need not be revised more frequently than at 12-month intervals. If the governing body intends to impose fees pursuant to NRS 268.821, it shall also deliver a copy of the notice required by this subsection to each holder of a business license, as shown in the records of the city, for a business located within the boundaries of the proposed district. If such notice is not delivered, the governing body shall not impose a fee pursuant to NRS 268:821. The ordinance must establish the boundaries of the district and the governing body may change the boundaries by ordinance. The area included within a district

may be:

(a) Coterminous or noncoterminous with the boundaries of the pedestrian mall established pursuant to subsection 3 of NRS 268.812; and

(b) Contiguous or noncontiguous, but must not include any area which is located more than 4 blocks from the boundaries of the pedestrian mall.

2. The operating entity shall report to the governing body an estimate of the cost of operating, managing and maintaining and annually improving the pedestrian mall for the ensuing fiscal year and an estimate of changes in the amounts of such costs recommended to or under consideration by the operating entity. The estimates must be reasonably itemized and must include a summary of the categories of cost properly chargeable to:

(a) The general fund of the city, if any; and

(b) The property in the district.

3. Except as otherwise provided in NRS 268.821, each year when the governing body has received and approved or amended the estimate of the costs for the ensuing fiscal year, the governing body shall prepare an assessment roll setting forth separately the amounts to be specifically assessed against the property in the district in proportion to the benefit received by the property from the pedestrian mall. The governing body shall distribute the costs to be assessed in proportion to the benefit received by each property on the basis of the frontage or area of, amount of traffic generated by, the number of rooms contained on the property or any other equitable basis or combination of bases as determined

by the governing body. An offset may be allowed for any portion of the annual cost of operating, managing, maintaining or improving the pedestrian mall which an owner of such property has paid directly or through contributions to a private operating entity. A description of the property and the name of the current owner of the property must be included for each property to be assessed. The names and addresses of the owners of such property may be obtained from the records of the county assessor or from such other source or sources as the governing body deems reliable. Any such list of names and addresses appertaining to the district may be revised from time to time, but such a list need not be revised more frequently than at 12-month intervals. Upon completion, the assessment roll must be maintained on file in the office of the city clerk and be available for public inspection.

4. The governing body shall meet annually to consider any objections to the amount of the assessments at least 20 days after a notice of hearing has been published once in a newspaper of general circulation in the city and mailed by certified mail to the owners of all assessed property in the district. The notice must set forth the time and place of the meeting and any matters to be discussed and may refer the person to the assessment roll for details. The hearing must be conducted in the manner specified in NRS 271.385, 271.390 and 271.395.

5. After the hearing, the governing body may adopt or change the proposed assessment, but any such changes must not result in an increased assessment for any property from the amount specified or referred to in the notice. When the governing body adopts an assessment ro11, the city clerk shall certify a copy and deliver it to the city treasurer for collection in the same manner as provided for the collection of special

assessments in chapter 271 of NRS. The assessment, together with any interest, penalties and costs of collection, are a lien against the property that is equal in priority to a lien for general taxes.

6. Money that is apportioned to or collected on behalfof a district must be credited to a special account and may only be used for the purpose for which it was apportioned or collected. Any balance remaining in the account at the end of the fiscal year must be conserved and applied towards the financial requirements of the next ensuing fiscal year. (1993, ch. 368, § 12, p. 1177.)

Effective date. — This section became effective July 1, 1993.

268.821. Governing body may require special license in lieu of imposing special assessment for cost of operation, management, maintenance and improvement of pedestrian mall; adoption of ordinance required; fees for special license; collection and deposit of fees.

1. Except as otherwise provided in NRS 268.820, in lieu of funding by special assessments as provided in NRS 268.820, the governing body may, by ordinance, require special licenses for businesses that operate in the district created pursuant to NRS 268.820 and establish fees for those licenses in such a manner as to distribute equitably the budgeted costs of operating, managing, maintaining and improving the pedestrian mall for the ensuing fiscal year among those businesses. The ordinance may establish reasonable categories of businesses subject to licensing and reasonable exemptions therefrom or abatements of the fees therefor. The amount of the fee for each license must be

determined by floor area of licensed business space, sales volume or another reasonable basis or combination of bases as determined by the governing body. An offset may be allowed for any portion of the cost of operating, managing, maintaining or improving the pedestrian mall which a business has paid directly or through contributions to a private operating entity.

2. All fees imposed pursuant to subsection 1 must be:

(a) Collected in the same manner as other business license fees are collected pursuant to this chapter; and

(b) Deposited in a separate account for the district.

3. The balance in the account for the district at the end of the fiscal year must be conserved and applied towards the financial requirements of the next ensuing fiscal year.

4. The ordinance requiring the special business license must provide a reasonable appeal procedure for any administrative determination made pursuant to the provisions of this section. (1993, Ch, 368, § 13, p. 1178.)

Effective date. — This section became effective July 1, 1993.

268.822. Preparation and approval of budget of public operating entity; money paid or transferred to private operating entity must be included in budget of governing body or redevelopment agency.

1. If the operating entity is a public operating entity created by the governing body for the purposes of paragraph (b) of subsection 1 of NRS 268.814, its budget must be

prepared and approved in accordance with chapter 354 of NRS and must be submitted to the governing body for approval.

2. If the operating entity is a private operating entity with which the governing body entered into a contract, all money which will be paid or otherwise transferred to the operating entity by the governing body or a redevelopment agency must be included in the budget of the governing body or redevelopment agency transferring the money which is prepared and approved in accordance with the provisions of chapter 354 of NRS. The governing body may conduct such review of the budget of the private operating entity as the governing body deems appropriate in connection with such a transfer. (1993, ch. 368, § 14, p. 1179.)

Effective date. — This section became effective July 1, 1993.

268.823. Provisions do not prohibit governing body from including pedestrian mall within area, district or zone established to improve or rehabilitate property.

NRS 268.810 to 268.823, inclusive, do not prohibit a governing body from including a pedestrian mall within the boundaries of any area, district or zone established pursuant to law which has as one of its purposes the encouragement of the construction of improvements or the rehabilitation of property located within its boundaries or the inducement of private enterprise to locate within those boundaries, whether by the provision of tax credits, exemptions or abatements or by the provision of special public financing arrangements. (1993, ch. 368, § 15, p. 1179.)

Effective date. — This section became effective July 1, 1993.

APPENDIX H

Chapter 11.68

PEDESTRIAN MALL

Sections:

11.68.010 Findings.
11.68.020 Definitions.
11.68.030 Established-Motorized vehicles prohibited.
11.68.040 Legal description.
11.68.050 Crossing vehicular traffic
11.68.060 The Fremont Street Experience Limited Liability Company—Private operating entity.
11.68.070 The Fremont Street Experience Limited Liability Company—Authorized to control and regulate.
11.68.080 Special permit vehicles.
11.68.090 Access to pedestrians.
11.68.100 Prohibited.
11.68.110 License fee—Exemption from code requirements.
11.68.120 Plans.
11.68.130 Violation—Penalty.

11.68.010 Findings. The City Council finds that there has been a progressive decline in the economic growth and vitality of businesses located in the central business district of the City which is attributable to the decrease in tourists and other visitors to the central business district, that a special effort is needed on the part of the City to create new jobs, maintain existing employment opportunities, attract new

businesses, tourists and visitors to the central business district and thereby restore the economic growth and vitality thereof and that the closure of certain streets or parts thereof to vehicular traffic and the creation of a Pedestrian Mall for the movement, safety, convenience, enjoyment, entertainment, recreation and relaxation of pedestrians is in the best interest of the City and beneficial to the owners of adjacent property and the businesses located in the central business district.

The City Council further finds that it is in the best interest of the public to select and contract with a private operating entity for the acquisition, construction, improvement, operation, management or maintenance of the Pedestrian Mall.

(Ord. 3941 § 5 (part), 1995)

11.68.020 Definitions. As used in this chapter:

(A) "Celestial vault lightshow" is the display of computer-generated electronic images on the ceiling of the celestial vault constructed above Fremont Street and the various light and sound effect accompanying such images.

(B) "Display vehicles" are those vehicles brought into the Pedestrian Mall for purposes of display to the public, and not for the primary purpose of transporting persons or property.

(C) "Emergency vehicles" are those motorized devices in, upon or by which any person or property is or may be transported or drawn upon a street or sidewalk, including, without limitation, automobiles, motorcycles and mopeds.

(D) "Exterior building improvements" means the building facades, marquees, overhangs, recessed entries, adjoining mall area paving materials, signage and graphics, adjoining landscaping, building illumination and audible effects or devices.

(E) "Motorized vehicles" are those motorized devices in,

upon or by which any person or property is or may be transported or drawn upon a street or sidewalk, including, without limitation, automobiles, motorcycles and mopeds.

(F) "Maintenance vehicles" are those vehicles owned or operated by the City of Las Vegas, as well as vehicles owned and operated by utilities and other vehicles requiring access onto the Pedestrian Mall for the purpose of the repair and maintenance of the Pedestrian Mall or facilities and structures contained therein.

(G) "Management agreement" means that agreement executed between The Fremont Street Experience Limited Liability Company and the City of Las Vegas for the purpose of acquisition, construction, operation, management or maintenance of the Pedestrian Mall.

(H) "Parade" is a group of persons with or without animals or vehicles in a public procession or march and does not include a procession or march in connection with a special event or mall entertainment.

(I) "Pedestrian Mall Act" refers to NRS 268.810 through 268.823.

(J) "Special events" include festivals, sporting events, exhibitions, entertainment and similar activities which are not offered on a continuous basis, whether or not members of the public pay an admission or entrance fee to be spectators or participants.

(K) "Special permit vehicles" are those vehicles authorized by The Fremont Street Limited Experience Liability Company in accordance with Section 11.68.080 to enter upon the Pedestrian Mall.

(L) "Mall advertising" includes all advertising in connection with the Pedestrian Mall including, without limitation, any means of marketing or promoting the Pedestrian Mall or its adjoining businesses, and thedisplay of

consumer goods or products to the users of the Pedestrian Mall for the purpose of encouraging the sale and purchase thereof, including, without limitation, signs, pictures or other displays.

(M) "Mall entertainment" is the conduct on the part of any person intended to provide entertainment, recreation, relaxation and enjoyment to the users of the Pedestrian Mall.

(N) "Mall vending" is the distribution, display or sale, or any combination thereof, of consumer goods or services (including food, drink or merchandise) from a pushcart, concession stand, kiosk or other similar structure designed for such purpose. (Ord. 3941 § 5 (part), 1995)

11.68.030 Established—Motorized vehicles prohibited.

There is established in the downtown area of the City of Las Vegas a Pedestrian Mall, the boundaries of which are described in Section 11.68.040. The surface of all areas designated therein as a part of the Pedestrian Mall shall be, after the completion of the construction thereon as evidenced by the issuance of a certificate of completion therefor by the City, limited to the use of pedestrians. Except for wheelchairs used to transport the physically disabled, emergency vehicles, maintenance vehicles, special access vehicles, display vehicles, or vehicles granted access to the Pedestrian Mall by the private operating entity, no motorized vehicle shall be permitted in the area designated under Section 11.68.040 as the Pedestrian Mall. (Ord. 3941 § 5 (part), 1995)

11.68.040 Legal description.

(A) The following area constituting and comprising the Pedestrian Mall is legally described in Exhibit A attached to Ordinance No. 3941, which is codified in this Chapter and adopted herein as a part of this Chapter.

(B) The area legally described in Subsection (A) of this Section is indicated on the map attached as Exhibit B to Ordinance No. 3941, which is codified in this Chapter and adopted herein as a part of thisChapter.
(Ord. 5046 § 1, 1997: Ord. 3941 § 5 (part), 1995)

11.68.050 Crossing vehicular traffic. Notwithstanding the prohibition contained in Section 11.68.030, vehicular traffic traveling along Casino Center Boulevard and Fourth Street shall be permitted to cross the Pedestrian Mall as those street intersect with Fremont Street except during the celestial vault lightshow in which case such street may be closed to through traffic and as otherwise approved in accordance with Section 11.68.130.
(Ord. 3941 § 5 (part), 1995)

11.68.060 The Fremont Street Experience Limited Liability Company—Private operating entity. In accordance with the provisions of the Pedestrian Mall Act, the City Council designates The Fremont Street Experience Limited Liability Company as the private operating entity for purposes of acquiring, constructing, improving, operating, managing and maintaining the Pedestrian Mall.

Subject to the other provisions of this Chapter and the management agreement, The Fremont Street Experience Limited Liability Company may determine the uses of the Pedestrian Mall for any purpose that will enhance the movement, safety, convenience, enjoyment, entertainment, recreation or relaxation of pedestrians, and other purposes necessary or appropriate to carry out the provisions of the Pedestrian Mall Act, including, without limitation, seating, merchandising, exhibiting, advertising and any other use, activity or special event which in the judgment of The

Fremont Street Experience Limited Liability Company will accomplish any of those purposes. The authority delegated herein to The Fremont Street Experience Limited Liability Company to determine the uses of the Pedestrian Mall shall not be construed so as to permit any use which is not permitted in a C-2 Zone. (Ord. 3941 § 5 (part), 1995)

11.68.070 The Fremont Street Experience Limited Liability Company — Authority to control and regulate. Notwithstanding any other provisions of the Las Vegas Municipal Code, and in accordance with the provisions of the Pedestrian Mall Act, the City Council delegates to The Fremont Street Experience Limited Liability Company authority to control and regulate within the Pedestrian Mall the following:

(A) The distribution and location of movable furniture, sculpture, devices to control pedestrian traffic, landscaping and other facilities that are incidental to the Pedestrian Mall;

(B) The uses to be permitted or restricted on the Pedestrian Mall by occupants of abutting property, utilities (provided such is not in conflict with the rights granted under any franchise agreement) concessionaires, vendors, newspaper vending machines and others to serve the convenience and enjoyment of pedestrians and the location of such uses;

(C) The raising of revenue through the imposition of a fee for the use of all or a portion of the Pedestrian Mall for special events or activities to offset the cost of operating and maintaining the Pedestrian Mall;

(D) The use of the Pedestrian Mall for advertising purposes and the charging of a fee in connection therewith;

(E) The operation of any lighting, heating or other facilities in the Pedestrian Mall;

(F) The replacement of any landscaping and maintenance of the furniture and facilities in the Pedestrian Mall;

(G) The access to the Pedestrian Mall by thepublic and closure of the Pedestrian Mall to the public for purposes of special events or activities for limited periods of time;

(H) Other activities, actions or conduct to promote the best interests of the public and carry out the provision of the Pedestrian Mall Act.

The authority delegated herein shall be subject to the City's police power, the provisions of the management agreement and the other provisions of this Chapter and shall not be construed in derogation of the constitutional or statutory rights of any person.
(Ord. 3941 § 5 (part), 1995)

11.68.080 Special permit vehicles. Upon proper application therefor, The Fremont Street Experience Limited Liability Company shall issue permits authorizing the special permit vehicles to enter upon the Pedestrian Mall. These permits shall be issued to the owners and occupants of property adjoining the Pedestrian Mall, or their designees, whose property as a result of the adoption of the ordinance codified in this Chapter does not have sufficient access thereto and therefrom for the delivery or pickup of merchandise and materials, or for the improvement, maintenance or repair of such property. The permit will identify the hours of each day that the special access vehicles will be granted access in accordance with the plan submitted under Section 11.68.120, and may be made effective for such period of time, not to exceed one year, as may be requested by the applicant. (Ord. 3941 § 5 (part), 1995)

11.68.090 Access to pedestrians

(A) The Fremont Street Experience Limited Liability Company shall allow access to pedestrians at all times along the entire length of Fremont Street in the Pedestrian Mall and along the entire length of the other streets therein except as otherwise approved in accordance with Section 11.68.120. This provision does not require that access along the entire length of the Pedestrian Mall always be at the same location but does require that access along the entire length of the Pedestrian Mall be allowed to pedestrians. For purposes of this Section, "pedestrian access" includes reasonable access for disabled persons in wheelchairs and similar devices. As a prerequisite to closure of the Pedestrian Mall, The Fremont Street Experience Limited Liability Company must obtain the review and approval of the City's emergency service (police and fire) providers.

(B) Notwithstanding any other provision contained in Secdon 11.68.070 and Subsection A of this Section, The Fremont Street Experience Limited Liability Company shall preserve and retain access for pedestrians to the businesses adjoining the Pedestrian Mall unless consent to the denial thereof has been obtained from the affected businesses. (Ord. 3941 § 5 (part), 1995)

11.68.100 Prohibited. The following are prohibited within the Pedestrian Mall:

(A) Animals unless used in connection with a mall activity authorized by The Fremont Street Experience Limited Liability Company or used for the purpose of assisting the visually or aurally impaired;

(B) Mall vending, mall advertising, mall entertainment special events or other commercial activities unless conducted

or authorized by The Fremont Street Experience Limited Liability Company;

(C) Parades;

(D) Unicycles, bicycles and other types of cycles, skateboards, roller skates, in-line skates and shopping carts except as authorized by The Fremont Street Experience Limited Liability Company in connection with special events and mall entertainment;

(E) Sleeping or camping;

(F) Littering;

(G) Sexually oriented businesses as described in Section 19.74.020 of the Las Vegas Municipal Code;

(H) The placement of any table, rack, chair, box, cloth, stand,booth, container, structure or other object within the Pedestrian Mall except as necessary for emergency purposes, or the maintenance or repair of the Pedestrian Mall, or as authorized by The Fremont Street Experience Limited Liability Company for special events, mall advertising, mall entertainment or mall vending or other commercial and entertainment activities;

(I) In-person distribution to passersby in a continuous or repetitive manner of any physical or tangible things and printed, written or graphic materials;

(J) Glass and metal beverage containers including, but not limited to, bottles, jugs, drinking glasses, aluminum cans and steel cans, during the hours of ten a.m. to 11:59 p.m. on December 31st, and the hours of twelve a.m. to eight a.m. on January 1st of each year;

(K) Feeding birds.

Any conduct "arguably protected" by the National Labor Relations Act is not included in these prohibitions until or unless such conduct is determined to be unprotected pursuant

to a decision of the National Labor Relations Board, "Arguably protect" as used herein has the same meaning as in San Diego Building and Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773 (1959). (Ord. 3941 § 5 (part), 1995)

11.68.110 License fee — Exemption from code requirements.

Notwithstanding the requirements set forth in other provisions of the Las Vegas Municipal Code, The Fremont Street Experience Limited Liability Company shall be licensed with a miscellaneous service license and pay a license fee according to its gross sales as provided in Section 6.04.050 of the Las Vegas Municipal Code. So long as such fee is paid. The Fremont Street Experience Limited Liability Company is exempt from the provisions contained in the following Chapters and Sections of the Las Vegas Municipal Code: The permit fees and licensing requirements of Chapters 6.11, 6.19, 6.26, 6.28, 6.30, 6.32, 6.42, 6.54, 6.62 (and exempt from the prohibition contained in Section 6.62.130 of this Chapter, 6.73, 6.76, 6.78, 6.81, 6.84 and, with respect to special events, Sections 6.50.120 and 6.50.130 provided the requirements of Section 6.50.440, 6.50.450 and 6.50.460 have been satisfied and the zoning land use prohibitions contained in Sections 19.46.060, 19.90.085 and Chapters 19.64 and 19.66. The exemptions granted herein apply to The Fremont Street Experience Limited Liability Company and its employees in connection with the acquisition, construction, improvement, operation, management and maintenance of the Pedestrian Mall.

(Ord. 3941 § 5 (part), 1995)

11.68.120 Plans.

(A) Prior to completion of construction of the Pedestrian Mall, The Fremont Street Experience Limited Liability Company shall submit to the City Council for review and approval a plan or plans which shall include the following:

(1) The architectural theme and design Standards which are proposed to be in effect for new exterior building improvements adjoining and facing the Pedestrian Mall and for the mall floorscape lying therein;

(2) The time and days of operation of the celestial vault lightshow;

(3) The location of any traffic control devices (pedestrian or vehicular) within the Pedestrian Mall;

(4) The manner in which access shall be preserved to businesses during the occurrence of any special events requiring the closure of a portion of the Pedestrian Mall to the public to the extent that such information can be provided as a part of the plan;

(5) The manner in which access will be assured into and onto the Pedestrian Mall by emergency vehicles;

(6) The days and hours on which special permit vehicles will be allowed access into and onto the Pedestrian Mall;

(7) The days and times in which Casino Center Boulevard or Fourth Street, or both, may be closed to vehicular traffic for special events; and

(8) The manner and times in which a portion of the Pedestrian Mall may be closed to pedestrian access for special events and other activities.

(B) For purposes of Subsection (A)(1) of this Section, the architectural theme and design standards in effect for new

exterior building improvements adjoining and facing the Pedestrian Mall are contained in that document entitled, "Fremont Street Experience Design Criteria Manual," three copies of which shall be on file with the City Clerk. The requirements for Subsections (A)(2) through (A)(8) of this Section shall be as set forth in that document entitled, "The Fremont Street Experience Traffic and Pedestrian Safety Plan," three copies of which shall be on file with the City Clerk. Subsequent to approval by the City Council, The Fremont Street Experience Limited Liability Company shall be responsible for implementing and complying with these plans, and the construction of new building exterior improvements adjoining or facing the Pedestrian Mall shall comply with the architectural theme and design standards contained in the Fremont Street Experience Design Criteria Manual.

(C) Any amendments proposed to these plans by The Fremont Street Experience Limited Liability Company may be made with the approval of the City Manager; except, however, that any amendment to the Fremont Street Design Criteria Manual shall require approval by the City Council.

(D) Except with respect to aesthetic review pursuant to LVMC Chapter 19.66, any approval given by The Fremont Street Experience Limited Liability Company shall not relieve a property owner who intends to construct new exterior building improvements from obtaining appropriate approvals and permits from the City which would be required regardless of any review and approval by the Fremont Street Experience Limited Liability Company. Review and approval of exterior building improvements by the Fremont Street Experience Limited Liability Company shall relieve the property owner from compliance with the aesthetic review process required by LVMC Chapter 19.66; provided, however, that any owner

aggrieved by the decision of The Fremont Street Experience Limited Liability Company may seek a determination from the City by means of the aesthetic review procedure set forth in LVMC Chapter 19.66.
(Ord. 3941 § 5 (part), 1995)

11.68.130 Violation — Penalty. Any person violating the provisions of Sections 11.68.030, 11.68.080 and 11.68.100 shall be guilty of a misdemeanor.
(Ord. 3941 § 5 (part), 1995)

APPENDIX I

Division V. Offenses Against Public Peace

Chapter 10.44

SOLICITATION

Sections:

10.44.010	Definitions.
10.44.020	Solicitation, by coercion — Misdemeanor.
10.44.030	Solicitation at certain locations — Misdemeanor.
10.44.040	On private property.
10.44.050	Effective date.

10.44.010 Definitions. For purposes of this Chapter:

(A) "Solicitation," for purposes of this Chapter, means to ask, beg, solicit or plead, whether orally, or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage, or gifts of items of value for oneself or another person or organization.

(B) "Coercion, means to wilfully and knowingly:

(1) Approach or speak to a person in such a manner as would cause a reasonable person to believe that the person is being threatened with:

(a) Imminent bodily injury, or

(b) The commission of a criminal act upon the person or another person, or upon property in the person's

immediate possession;

(2) Persist in a solicitation after the person solicited has given a negative response;

(3) Block, either individually or as part of a group of persons, the passage of a solicited person; or

(4) Engage in conduct that would reasonably be construed as intended to compel or force a solicited person to accede to demands.

(Ord. 3862 § 3 (part), 1995)

10.44.020 Solicitation, by coercion — Misdemeanor.

Any individual who personally commits solicitation by coercion shall be guilty of a misdemeanor.

(Ord. 3862 § 3 (part), 1995)

10.44.030 Solicitation at certain locations— Misdemeanor. Any individual who personally engages in solicitation at any of the following places shall be guilty of a misdemeanor:

(A) At any bus, taxi, limousine, trolley or train stop;

(B) In any public transportation vehicle or facility;

(C) At any enclosed parking structure;

(D) Within twenty feet of an Automatic Teller Machine (ATM);

(E) Within ten feet of a point of entry to or exit from any building open to the public, including commercial establishments;

(F) Within the area designated as a pedestrian mall in Ordinance 3747, in accordance with NRS 268.810 et seq.

(Ord. 3862 § 3 (part), 1995)

10.44.040 On private property. If property is owned or controlled by a private owner or operator, nothing in this

Chapter shall be construed as applying to the conduct or activity of a person on said property with the permission of the owner or operator of the property.
(Ord. 3862 § 3 (part), 1995)

10.44.050 Effective date. Subsection (F) of Section 10.44.030 shall become effective only after adoption by the City Council of a Resolution declaring the pedestrian mall in Ordinance 3747 as being "substantially complete." All other parts of this ordinance shall become effective upon publication and signature.
(Ord. 3862 § 3 (part), 1995)

APPENDIX J

SEE FOLD OUT EXHIBIT

PHOTOGRAPHS OF PEDESTRIAN MALL

UJIFILM

DIPPERS
BUCKETS OF
CLAMSHELL
GUILCUP

No. 03-705

IN THE

Supreme Court of the United States

CITY OF LAS VEGAS, *et al.*,

Petitioners,

—v.—

AMERICAN CIVIL LIBERTIES UNION OF NEVADA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

In an attempt to restore its declining downtown hotel casino industry to its storied past, the City of Las Vegas followed the lead of towns across the United States and turned five blocks of its main downtown street into a publicly-owned pedestrian mall, the Fremont Street Mall. What was once known world-wide as "glitter gulch" because of the hotel casinos that rose up on both sides of Fremont Street with giant neon light displays was given an expensive make-over to compete with newer mega hotel casinos that have been built on Las Vegas Boulevard, known as the "Strip." To shield visitors from individuals distributing literature or soliciting membership or contributions, the City placed significant restrictions upon all First Amendment activities on the Fremont Street mall. Perversely, the ban on First Amendment activity gives the downtown casinos a competitive advantage over the casinos located on the Strip where similar attempts broadly to prohibit First Amendment activity have been repeatedly invalidated. After running afoul of the restriction upon First Amendment activities, the American Civil Liberties Union of Nevada ("ACLU") and others brought suit in an attempt to restore their First Amendment rights to where they were when Fremont Street was an undisputed public forum. App. 4a.

As described by the lower court, in the early 1990s, downtown Las Vegas was suffering from an economic downturn. The area was seen as sleazy and unsafe, and downtown casinos were unable to compete with the glitzy Las Vegas Strip. Moreover, key economic factors showed that the area was in decline. In an effort to halt the slump and return downtown to its former luster, city officials decided to emulate economic revival measures taken in cities throughout the United States by creating a pedestrian-friendly zone. Five blocks of Fremont Street, the center of the downtown area, were closed off to automotive traffic.

The City of Las Vegas contracted with a private entity, the Fremont Street Experience Limited Liability Corporation ("FSELLC"), to transform frumpy Fremont Street into the glamorous Fremont Street Experience. At a cost to the public and contributing Fremont Street businesses of $70 million, the street and sidewalk were torn up, various underground infrastructure elements were installed, the street was decoratively repaved as one large promenade, and a canopy capable of generating a lightshow (known, with a dash of hyperbole, as the "celestial superstructure") was installed over certain parts of the street. In the evening, the lightshow plays overhead for a few minutes each hour. App. 6a. Although Fremont Street itself is partially covered by the canopy, it remains open to the elements from above and all sides. App. 24a.

The street mall is also host to regular entertainment and promotional events designed to bring gamblers and business back downtown. These events, however, are not meant to compete with the City's primary objective of getting people back into the hotels and casinos that anchor the street mall. In this sense, the street mall is different from the downtown sports complexes or special events venues present in other recent public forum cases. The promotional and entertainment events that are staged are the type of street performances that are common in other outdoor pedestrian malls and tourist districts. The lower court identified a number of these other commercial venues from similar cases that arose in San Francisco, Los Angeles, and Venice Beach, California. App. 25a. The petitioners are clearly dissatisfied with the lower court's factual finding on this issue, but such factual disputes do not warrant review by this Court.

Despite its expensive makeover and the added attractions, Fremont Street's objective attributes as a major downtown street have not changed. The street mall is open to unrestricted pedestrian use and is part of the downtown transportation grid. Historic Fremont Street lies at the center

of the mall and is the main axis, intersecting five city blocks. All First Amendment activity is prohibited on Fremont Street itself and on the streets that intersect with it and those that anchor both ends. The perimeter streets and sidewalks are continuous with and adjacent to downtown's other streets and sidewalks. A visitor to this area would not walk around the mall to travel to the other side, but would walk through the mall either on Fremont Street itself or on one of the streets that intersect it. Although cars are no longer permitted to drive down the length of Fremont Street itself, the enabling legislation and the agreement between FSELLC and the City requires that a route for pedestrians remain open at all times, limiting FSELLC's discretion to manipulate the landscape or otherwise obstruct pedestrian use. Additionally, automotive traffic is permitted to cross the Fremont Street Mall in two places, and pedestrians cross at each intersection. App. 22a. The street is seamlessly incorporated into the City's downtown transportation grid and continues to anchor the central business and gaming district. *Id.* The addition of entertainment to the Fremont Street Mall's uses did not alter the fact that it remains a public thoroughfare and one of the City's two premiere gaming and commercial districts. *Id.*[1]

Fremont Street Mall is still a street as defined by the enabling legislation. City and State codes define pedestrian malls generally, and the Fremont Street Mall specifically, as streets and sidewalks. App. 23a-24a. The same major hotels, casinos and many of the same retail establishments such as McDonalds, still line the sides of Fremont Street just as they did before the renovation. Fremont Street is still located squarely in the middle of downtown, and pedestrians use it for the same purposes as they did previously. The Fremont Street Mall remains open to the elements despite the

[1] Respondents have provided this Court with photographs reproduced from the record below. *See* Respondents' Appendix A.

canopy and light-show. App. 23-24a. Both before and after its transformation, Fremont Street remains a commercial district and public thoroughfare. The grime of Fremont Street has been scrubbed away and it has been dramatically redesigned in a way that the traditional curb and gutter sidewalks fit seamlessly into the street, but its character as a commercial street remains. *Id.*

In an ill-conceived plan to protect the investment-backed expectations of the street mall's principal beneficiaries (the hotel casinos) from the competition of the type of First Amendment activity that was historically freely permitted on Fremont Street, the City enacted a number of ordinances broadly prohibiting those activities on Fremont Street. App. 7a, 142-144a.[2] The interests and expectations of the Fremont Street hotel casinos, however, are indistinguishable from the interests and expectations of other major casino hotels and industries in Las Vegas that have made capital expenditures. Similarly, the City's interest in the project is the same as the interest shared by all municipalities that expend public funds or provide tax

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[2] Section 10.44 of the Las Vegas Municipal Code (LVMC) prohibits any form of solicitation in the Fremont Street Experience, and sections 11.68.100(I), (B), and (H) respectively prohibit leafleting, unauthorized vending and the placement of displays and tables. There are no specific prohibitions against picketing and demonstrations, although these may be restricted by general prohibitions against obstructive conduct. LVMC § 10.47.010. App. 8a. Inexplicably, LVMC § 11.68.100, which contains the restrictions on handbilling, street sales, and the placement of tables or displays on Fremont Street, carves out an exception for First Amendment activities by labor organizations and, of course, for speech sponsored or approved by FSELLC officials. App. 142a-144a. Additionally, plaintiffs-respondents have alleged from the start that, despite the ban on solicitation contained in LVMC § 10.44, casino advertisements targeting gamblers and soliciting business are constantly being forced upon the very same people whom the petitioners allegedly hope to protect from this type of activity. The full text of the challenged ordinances can be found at App. 142a-144a and 148a-150a.

incentives to attract or keep businesses in the city. The City itself is not a partner in the venture in the sense that it has a direct financial stake in the success of the project. The City has not taken a mortgage or note from the FSELLC, and it receives no rents or profits. The FSELLC is solely responsible for the operation and maintenance of the mall. The responsibility for the Fremont Street project has been contractually delegated to the FSELLC, which has principal control over all commercial uses and aspects of the property, including security. App. 74a. FSELLC is solely responsible for paying the mall's operation and maintenance expenses of approximately $6 million to $10 million annually. *Id.* The petitioners' attempt to characterize their financial interest in the success of this venture as unique must be understood in this context.

The American Civil Liberties Union of Nevada and others challenged the restrictions on First Amendment activities.[3] The petitioners moved for summary judgment, which was granted in part and denied in part. App. 111a-115a. The district court found that the City had created a nonpublic forum because its principal purpose was to stimulate economic growth rather than expression, and because the textured pavement and canopy distinguished the mall from surrounding streets and sidewalks. App. 86a-96a. Applying the lesser First Amendment standard governing non-public fora, the lower court granted summary judgment to the City on the solicitation and tabling/display bans. App. 113a-114a (district court analysis); *see also* App. 58a-62a, 65a (discussing *inter alia Int'l Soc'y for Krishna*

[3] In addition to the challenged ordinances, the complaint alleged that FSELLC had "adopted policies prohibiting traditional First Amendment activity on the Fremont Street Experience, such as proselytizing, charitable soliciting, distributing literature, circulating petitions and collecting signatures, picketing, and giving away or selling message-bearing merchandise," and sought an injunction and a declaration that the restrictions were unconstitutional both facially and as applied. App. 8a.

Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)). The petitioners' motion was denied as to the remaining claims. App. 113a-115a. In a later opinion, the district court granted summary judgment to the plaintiffs on the leafleting and vending bans, finding the ordinances unconstitutional even under the more lenient resonableness-viewpoint neutrality scrutiny applied to speech restrictions in nonpublic fora. App. 55a-58a, 62a-65a. As an alternative ground for invalidating the leafleting ordinance, the district court held that it violated the Equal Protection Clause because of the exemption for labor organizations. App. 53a-55a. *See Carey v. Brown,* 447 U.S. 455 (1980).[4]

Affirming in part and reversing in part, the Ninth Circuit reversed the district court's determination that Fremont Street's status as a public forum no longer existed. The court noted at the outset that "as society becomes more insular in character, it becomes essential to protect public spaces where traditional modes of speech and forms of expression can take place." App. 11a. The court, of course, was quoting from Justice Kennedy's opinion in *United States v. Kokinda,* 497 U.S. 720, 737 (1990) (Kennedy, J., concurring in the judgment). The court observed that this is "particularly true with respect to downtown public spaces conducive to expressive activities." App. 11a-12a. The court also addressed the growing phenomenon of the commercialization of public spaces and governmental attempts to control speech in newly created entertainment, tourist, and commercial venues located in the downtowns of many major American cities. It cited case from its own and other court of appeals, including *Chicago ACORN v. Metro. Pier and Exposition Auth.,* 150 F.3d 695 (7th Cir. 1998), and *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.,* 308 F.3d 1114 (10th Cir. 2002).

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[4] In its original order, the district court entered a preliminary injunction on plaintiffs' leafleting and vending claims. App. 99a-101a, 106a-108a. In its second order, the injunction was made permanent. App. 53a-67a.

Applying this Court's forum analysis to the challenged restrictions, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983); *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666 (1998), the court below had little difficulty concluding that, based on its "objective attributes," Fremont Street was the quintessential public forum. The court began its analysis by explaining that streets, sidewalks and parks generally "are considered, without more, to be public forums." *See Hague v. CIO,* 307 U.S. 496 (1939); *United States v. Grace*, 461 U.S. 171 (1983) and *Frisby v. Schultz,* 487 U.S. 474, 481 (1988). Citing the objective factors present in traditional public forum cases, the court considered the three factors that it considered determinative; (i) the actual use and purposes of the property, (ii) the area's physical characteristics, and (iii) the traditional or historic use of the property in question and similar properties. App. 18a-19a (citations omitted).

After carefully reviewing each of these criteria, the court determined that Fremont Street qualifies as a traditional public forum because, despite its expensive makeover and the addition of entertainment, it "remains a public thoroughfare." App. 22a. The court noted that the street mall is open at all times for pedestrians, and cars cross over at two points. *Id.* As to the issue of physical characteristics, the street mall remains a commercial street even though its physical appearance has changed. The city and state codes define pedestrian malls generally as streets, and in fact Fremont Street remains an integral part of the city's transportation grid. The mall's "openness to the public and smooth integration into downtown preserve its public forum status." App. 23a-24a. Finally, the court held that the third criterion was satisfied due to Fremont Street's historic use, and cited other cases where courts have treated pedestrian malls or similar venues as traditional public forums. App. 24a-25a.

Rejecting the district court's reliance on the City's intent to stimulate commercial activity rather than expression, the court reiterated that "traditional public fora are open for expressive activity regardless of the government's intent." App. 26a (quoting *Forbes*, 523 U.S. at 678). The court also held that, although it is possible for a public forum to lose its status, "the destruction of public forum status . . . is at least presumptively impermissible." App. 28a (citing *Grace*, 461 U.S. at 180). The court concluded that the forum has not been closed in this case, as the actual use of Fremont Street, both before and after its transformation, is as a commercial district and public thoroughfare. App. 29a. Finally, the court rejected the petitioners' argument that the forum's "primary function and purpose" as a commercial venue is determinative of its status. The court focused instead on the actual purpose. Citing its cases involving the Las Vegas Strip and cases from other circuits involving downtown tourist and shopping districts, the court held that the "use and purpose" of Fremont Street remains as a public thoroughfare and that its "use and purpose" was not altered either by closing it to traffic or by the addition of entertainment. App. 22a. The court ultimately determined that although the "grime of Fremont Street has been scrubbed away and it has been dramatically redesigned, . . . its character as a commercial street remains unchanged." App. 29a.

Turning to the restrictions on speech, the Ninth Circuit held that the district court properly granted the injunction prohibiting the distribution of literature – even under the lesser standard of reasonableness governing nonpublic fora. App. 5a. The court held that the complete ban on leafleting was "properly granted under any standard," and clearly "cannot survive the more rigorous standard appropriate for a public forum." App. 30a-31a. The court also upheld the district court with respect to the section of the ordinance that prohibited unauthorized vending on the

street. The court first observed that the sale of merchandise that carries or constitutes a political, religious, philosophical or ideological message is protected under its precedents. Adopting the analysis of the district court, the court held that the ban on vending not authorized by government officials is invalid -- even under the reasonableness standard applicable to nonpublic forum restrictions -- because it leaves "unbridled discretion to regulate speech" with those officials. App. 32a-33a.[5]

Finally, court vacated and remanded the solicitation and tabling/display bans for the district court to assess whether the City could show that these restrictions are narrowly tailored to serve a significant government interest without burdening substantially more speech than necessary to do so. App. 33a-36a. Before the mandate could issue, the petitioners sought and were granted a stay, which respondents did not oppose.

REASONS FOR DENYING THE WRIT

This case involves a still evolving dispute about the scope of authority of the City of Las Vegas to establish a "no speech zone" on its main downtown street located in the heart of the City's major gaming and commercial district. Following the lead of cities elsewhere hoping to restore their declining downtown commercial base, Las Vegas closed historic Fremont Street for five blocks to all vehicles and reconstituted it as a pedestrian mall. As courts have noted, this method of urban revitalization is increasingly common. What is unusual about this case, however, is the City's attempt to stifle speech in order to protect the investment-backed expectations of the downtown business association, comprised principally of the major hotel casinos that have

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[5] In view of its holding on First Amendment grounds, the court did not consider the district court determination that the ordinances also violate the Equal Protection Clause by exempting certain labor-related activities. App. 29a, n.14.

been in Las Vegas for decades. Fremont Street has always been a storied and premiere gaming venue that until now was indisputably a public forum. Without citing any authority from this Court or the courts of appeals, the petitioners maintain that a pedestrian mall that is constructed over the City's old streets and sidewalks is exempt from First Amendment constraints. They assert that First Amendment activity is incompatible with the primary purpose of the street mall and that it is somehow bad for business. The petitioners are assuredly wrong. Public highways and streets are the quintessential public forum. Holding that an outdoor pedestrian mall in the heart of downtown cannot be a First Amendment forum would lead to the untenable conclusion that many public streets, sidewalks, parks, and plazas, which anchor tourist and commercial districts, are not traditional public fora, a holding that is contrary to decades of this Court's jurisprudence.

Despite the absence of authority supporting its position, the petitioners advance four reasons for granting certiorari in this case. First, the petitioners claim there is a general conflict with the decisions of this Court and the decisions of the Eleventh and Seventh Circuits over the proper application of public forum analysis. The alleged conflict, however, is less about the applicable legal standard then the outcome reached by the Court based on different facts. The petitioners also claims there is a narrower conflict with the Second Circuit over the significance of the forum's objective attributes and primary use as a factor in the forum analysis. This alleged conflict does not in fact exist, however, because the Second Circuit opinion specifically distinguished cases like this one involving downtown streets and sidewalks. Third, the petitioners ask this Court to grant a writ of certiorari because of the significant and practical problems created by the Ninth Circuit's decision about how best to use publicly owned property for commercial and entertainment purposes. They greatly exaggerate the

significance of these problems. Moreover, those concerns cannot provide the justification for jettisoning the First Amendment principles that have always protected the rights of citizens to use the municipal streets and sidewalks for purposes of assembly and expression. Finally, the petitioners assert that the Court should grant the writ to check the Ninth Circuit's purported "expansion" of public forum doctrine. Contrary to the petitioners' argument, however, the decision below breaks no new ground. It is the petitioners who are making a constitutional mountain out of what, in effect, is a factual molehill. They are asking this Court to undertake the impossible task of addressing the myriad factual circumstances under which a government may validly close a public forum, even though that is not what has occurred here. We respectfully submit that none of the petitioners' claimed reasons for review have merit, and that the petition should be denied for the reasons set forth below.

1. Contrary to the petitioners' contention, there is no conflict with this Court's forum analysis. The Ninth Circuit decision applies traditional forum analysis and is faithful to this Court's precedents. The cases cited by the petitioners, *Greer v. Spock*, 424 U.S. 828 (1976), and *ISKCON v. Lee, supra,* support the Ninth Circuit's analysis and, moreover, are easily distinguishable on their facts. This case does not involve a military base or an airport. Rather, it involves Las Vegas's premiere and busiest street in the heart of downtown. The other cases cited by the petitioners are also easily distinguishable on their facts and do not suggest a conflict over the applicable legal standard. *See Chicago ACORN*, 150 F.3d at 702 (commercial complex constructed on former Navy Pier was not a traditional public forum); *Sentinel Communications Co. v. Watts,* 936 F.2d 1189, 1203-04 (11th Cir. 1991) (sidewalks leading to the restrooms at interstate rest areas, are not traditional public fora). Applying the same legal principles in *Chicago ACORN*,

Judge Posner, writing for the Seventh Circuit, made a point of distinguishing cases like this one, which involves a former street now closed to traffic but that continues to anchor the downtown commercial districts. The court, of course, was referring to Chicago's famous "State Street." 150 F.3d at 702-03. It is not surprising, therefore, that the Ninth Circuit cites *Chicago ACORN* throughout its opinion in support of its conclusion that Fremont Street is a public forum.

2. Similarly, there is no merit to the petitioners' contention that the decision below conflicts more pointedly with the Second Circuit's recent decision involving New York's Lincoln Center for the Performing Arts. *Hotel Employees & Rest. Employees Union Local 100 v. City of New York Dep't of Parks & Recreation,* 311 F.3d 534 (2d Cir. 2002). The case was decided on a completely different set of facts and does not raise a dispute over the applicable legal principles; instead, it demonstrates nothing more than different legal outcomes arising from the application of established legal principles. This case was decided based on the forum's objective attributes and its character and use as a central commercial street. The Second Circuit's opinion not only distinguished cases like this one involving traditional downtown streets and sidewalks, but also concluded that the plaza outside Lincoln Center performs a different function than the use and function of Fremont Street. Whether one agrees or disagrees with the factual conclusion reached by either court about the objective attributes of the forum under consideration, it is a different view of the facts rather than the law that explains the different conclusions reached by the Second Circuit and the court below.

3. Additionally, no weight should be given to the petitioners' contention that the Ninth Circuit decision creates significant practical problems for municipalities about how best to use publicly owned property for commercial and entertainment purposes. When Fremont Street was closed to vehicles, the petitioners voluntarily

dedicated Fremont Street to public use and agreed to keep the street open and accessible for pedestrian use at all times. Petitioners overstate the importance of the issues at stake here. In traditional public fora, the City's desire to protect its residents and visitors from the distractions of peaceful and unobtrusive First Amendment activity has never been a consideration in this Court's public forum cases. In fact, this Court's cases have long held that streets and sidewalks are the natural locus for First Amendment activity. Similarly, it is irrelevant that the City's private partners in this project believe that First Amendment activity will somehow impede their commercial objectives and defeat their investment-backed expectations. These are the very same casinos and businesses that have always anchored Fremont Street and they are no more entitled to a "free speech zone" then they were before the street and curb and gutter sidewalks were reconfigured to fit seamlessly into each other. Their interests are no different than the interests of other businesses located in other parts of Las Vegas and cities elsewhere. What the petitioners seek is a competitive advantage over other businesses and casinos anchoring the Las Vegas Strip, where similar attempts to restrict First Amendment activity have been struck down. *See Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001), and *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998). Similarly, the City's interest in ensuring the success of this project is indistinguishable from its interests in other projects using public funds to attract and keep businesses. That interest has never been thought sufficient to restrict speech on traditional public fora. *See Chicago ACORN*, 150 F.3d at 702-03 (distinguishing City's interests in tax revenues from the City's interest as a proprietor).

4. Finally, the Ninth Circuit decision does not represent an expansion of public forum doctrine beyond its historic confines. Notwithstanding the petitioners' arguments to the contrary, this case does not present

circumstances where the City has voluntarily closed a public forum or changed its character as a central commercial street. Moreover, there is no overarching reason for this Court to grant a writ of certiorari in order to address the multitude of circumstances under which the government might properly close a public forum. The petitioners do not even claim there is a conflict in the circuits on this issue because none exists, as these cases are necessarily fact specific. Although interesting First Amendment issues might arise in a case where the government withdrew a public forum and created a special events venue that purported to limit the public's access or remove it from the City's transportation grid, this case does not remotely present those facts or those issues. This case does not involve a City's effort to bring a sports complex or private mall downtown that is constructed over what used to be public streets and sidewalks. To the contrary, the Fremont Street is still a street and it remains a vital downtown artery for pedestrian traffic.

I. PRUDENTIAL REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

Before turning to the petitioners' asserted grounds for granting a writ of certiorari, we submit that there are sound prudential reasons for the Court to stay out of this dispute at this juncture. First, the court of appeals held that the municipal ordinances restricting leafleting and the sale of message-bearing materials fails even under the lesser First Amendment standard governing non-public fora applied by the district court. App. 5a. *See ISKCON, supra.* That holding is unlikely to change no matter how this case is decided. Given the record in this case, the petitioners are unlikely to benefit from a decision on the public forum issue – regardless of outcome. In fact, they have not even raised this issue in their petition. [6]

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[6] Additionally, the district court also held that the leafleting ban violated the Equal Protection Clause because it carved out an exception for labor

The other claims raised by respondents present a different problem that makes this case inappropriate for review at this time. The Ninth Circuit did not rule on respondents' claims challenging the restrictions on solicitation and informational tabling. Those claims were remanded for additional findings that may or may not result in a ruling enjoining the challenged restrictions. Under these circumstances, the petition is premature. Hence, there is no urgency or compelling reason for this Court to assert itself into the dispute at this juncture. The petitioners will have ample opportunity to pursue further appeals in the event of an adverse order granting plaintiffs-respondents additional relief on their remaining claims.

II. THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S FORUM ANALYSIS OR THE USE OF THAT ANALYSIS BY THE LOWER COURTS

As the Supreme Court has explained, streets, sidewalks, and parks "traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *Grace,* 461 U.S. at 179. Indeed, the Court has decreed that sidewalks are the "archetype of a traditional public forum." *Frisby,* 487 U.S. at 480. That is because from "'time out of mind' public streets and sidewalks have been used for assembly and debate, the hallmarks of a traditional public forum." *Id.* (quoting *Hague*, 307 U.S. at 515). As this Court recently underscored, "traditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these

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organizations. App. 53a-55a. The court of appeals found it unnecessary to reach the issue in view of its holding that the injunction was properly granted under the First Amendment. App. 29a, n.14. Here again the petitioners have not preserved this issue.

properties require the government to accommodate private speakers." *Forbes,* 523 U.S. at 677-78.

In this case, there is no dispute that for decades prior to its restoration, Fremont Street was the quintessential public forum. It has always been the busiest downtown street in Las Vegas and anchors the City's thriving and historic gaming district. Without citing any direct authority, the petitioners broadly assert that the "modern" Fremont Street is no longer a public forum because it has been dramatically redesigned and its use as a street has changed. The Ninth Circuit rejected these premises and determined that Fremont Street's actual use and purpose as a commercial street have not changed. Based on objective criteria present in this Court's public forum cases, and cases cited by other courts of appeals, the Ninth Circuit rejected the petitioners' argument that Fremont Street's status as a public forum had changed. The court specifically determined that the actual use of Fremont Street, both before and after its transformation, remains as before. The court observed, "[t]he grime of Fremont Street has been scrubbed away and it has been dramatically designed, but its character as a commercial street remains." App. 29a.

The petitioners attempt to draw this Court into a conflict by arguing that the government, like a private property owner, has the power to preserve the property under its control for the use to which it is lawfully dedicated. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 800 (1985). Similarly, the petitioners assert that the Court has long rejected the argument that any time publicly-owned property is opened to the public, it thereby serves as a public forum for speech. *See Greer*, 424 U.S. at 836. Respondents have no quarrel with these general observations. Nor do respondents dispute that "modern" venues, like airport terminals and highway rest stops do not qualify as traditional public fora, even though they are

generally open to the public. *ISKCON*, 505 U.S. at 680; *Sentinel Communications,* 936 F.3d. at 1203.

Fremont Street, however, is first and foremost a street and, therefore, presumptively a public forum. *See Grace,* 461 U.S. at 179. Although it is possible to change the status of a public forum by closing it or by altering the "objective physical character or uses of the property," *ISKCON,* 505 U.S. at 700 (Kennedy, J., concurring), the actual use of Fremont Street as a commercial street remains unchanged. App. 29a. This is true despite the expensive makeover and the addition of regularly scheduled promotional events. The Ninth Circuit broke new ground in this case and instead, followed this Court's lead by observing that the government "may not by its own *ipse dixit* destroy the public forum status of streets and parks which have historically been public forums." App. 28a (quoting *Grace,* 461 U.S. at 180). Instead, the court properly focused on the objective attributes of the property rather than the intent of the parties to change the status of the forum. *See Forbes,* 523 U.S. at 678.

Finally, by directing this Court to *Chicago ACORN*, the petitioners show how critically they misperceive public forum doctrine. That case involved a challenge to restrictions on First Amendment activity on Chicago's Navy Pier. Judge Posner, writing for the Court described the area as follows:

> Navy Pier, in downtown Chicago, juts out 3,000 feet into Lake Michigan and is more than 400 feet wide at its widest point. Formerly a naval facility, by the 1980s it was little used and in 1989 the Illinois legislature handed it over to the MPEA (at the time known as the Metropolitan Fair and Exposition Authority) and appropriated $200 million for the pier's renovation. The pier was to be transformed into a recreational and

> commercial center – part park, part meeting and exhibition facility, part shopping emporium, part amusement park.

150 F.3d at 698.

One issue confronted by the Seventh Circuit was whether the walkways and the plaza on the pier should be classified as a public forum. In stating that such areas did not meet the criteria for public forum status, Judge Posner noted:

> The sidewalks are not through routes; they lead only to the pier facilities themselves. . . . Rather than being part of the city's automotive, pedestrian, or bicyclists' transportation grid, the sidewalks on the pier and the service street on its north side are internal to the pier, like the sidewalks, streets, and parking lots in Disney World or McCormick Place (Chicago's major convention center, also owned by the MPEA). *Cf. United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion). The pier itself is a discrete, outlying segment or projection of Chicago rather than a right of way. It is its own little world of delights and in this respect it is something like a major airport, which the Supreme Court in *ISKCON*, 505 U.S. at 672, refused to classify as a public forum.

Id. at 702.

The criteria the Seventh Circuit used to determine that Navy Pier was not a public forum point to the opposite conclusion when applied to the instant case. For this reason, it is not surprising that the Ninth Circuit cited Judge Posner's opinion throughout in support of its determination that Fremont Street, by contrast, is a public forum. App. 11a, 16a, 20a, 23a. Fremont Street and the surrounding streets

that comprise the Fremont Street Experience are a major part of the "transportation grid" of downtown Las Vegas. Although the Navy Pier is a "discrete, outlying segment or projection of Chicago rather than a right of way," the opposite is true in Las Vegas. Far from being a mere appendage to downtown, Fremont Street is its core commercial thoroughfare. Furthermore, Chicago's Navy Pier never was a public forum. The creation of the complex there did not involve an attempt to change the status of a longstanding public forum.[7] In short, the analysis in *Chicago ACORN* is entirely consistent with the result reached below.

Another important difference from the Seventh Circuit case is that *Chicago ACORN* involved a situation in which the City of Chicago owned all of the property on the Pier. The private businesses located there rented from the government. In contrast, the Fremont Street Experience is designed to aid preexisting private businesses, particularly

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[7] The Seventh Circuit also emphasized that the City of Chicago owned all of the buildings on Navy Pier in contrast to State Street in Chicago and the Fremont Street Mall in this case:

> Because the MPEA owns the buildings on Navy Pier and depends for the upkeep of the pier on the commercial revenues that those buildings generate, it has a legitimate and substantial interest in preventing activities that could kill those revenues. It has a greater interest than the City of Chicago itself has in the prosperity of the shops along State Street. Even that interest is not negligible, because the amount of tax that the City can extract from merchants and their customers depends on the merchants' revenues. But it is a lesser interest than the MPEA's corresponding interest in the commercial health of Navy Pier and therefore it does not justify equivalent restrictions on political expression. This may be why State Street is a traditional public forum and Navy Pier is not.

150 F.3d at 702-03.

the casino-hotels. According to the Seventh Circuit that distinction is important.[8]

If the petitioners have a dispute here, it is with the Ninth Circuit's determination that Fremont Street's character as a central commercial street has not changed. Whether one agrees or disagrees with that conclusion it indisputably formed the basis for the Ninth Circuit's holding. Nothing in the decision suggests any disagreement with the holdings in this Court's cases or in the *Chicago ACORN* decision. The petitioners' quarrel is with the Ninth Circuit's factual premise. Once that premise is accepted, the Ninth Circuit's public forum analysis is both unexceptional and entirely consistent with the approach taken by this Court and by numerous other courts.

If anything, this case and a dozen other cases, as well, demonstrate that the lower courts fully understand the governing legal principles and are entirely capable of applying this Court's public forum doctrine to disparate facts. *See Lederman v. United States,* 291 F.3d 36 (D.C. Cir. 2002) (sidewalks outside Capitol building are a public forum); *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.,* 257 F.3d 937 (9th Cir. 2001) (sidewalks in Las Vegas gaming district are a public forum); *Hawkins v. City and County of Denver,* 170 F.3d 1281, 1287-88 (10th Cir. 1999)

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[8] The Seventh Circuit addressed the extent that municipalities can go to emulate private property owners, concluding that governments do not have the same rights to control protected expression as owners of private facilities:

> [N]owhere is it written that government, when it embarks on essentially commercial ventures, is entitled to the same freedom of action as private ventures. It is not as if the ownership of shopping malls and convention centers were at the core of the American concept of government.

Id. at 701.

(finding that Galleria entryway to Denver Performing Arts Complex not public forum); *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999) (park-like mall on grounds of government complex is a traditional public forum); *Chicago ACORN*, 150 F.3d at 695 (sidewalks, plaza, and amusement park located on Navy Pier are not a public forum); *Congregation Lubavitch v. City of Cincinnati,* 997 F.2d 1160, 1161 (6th Cir. 1993) (downtown plaza is a public forum); *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992) (sidewalks surrounding Vietnam Veteran's Memorial are a public forum); *Paulsen v. County of Nassau,* 925 F.2d 65 (2d Cir. 1991) (sidewalks around sports complex are a designated public forum). Hence, not only is there no conflict among the circuits, there is no confusion in the lower courts over the governing legal standards or a need for further clarification by this Court.

III. THE DECISION PRESENTS NO DIRECT CONFLICT WITH THE SECOND CIRCUIT

In an attempt to manufacture a more specific conflict, the petitioners assert that the Second and Ninth Circuits disagree about the proper weight that should be given to the objective physical characteristics and use of the property in making a forum determination. What the petitioners fail to acknowledge is that in making the forum determination, both courts were informed by the same factors, including the "location, use, and purpose of the property in question." *Hotel Employees,* 311 F.3d at 546. In a case involving Lincoln Center for the Performing Arts, the Second Circuit stated that the property's "primary function and purpose" is an important consideration in cases that do not easily meet the historic definition of a traditional public forum. *Id.* at 550. Any purported conflict only arises from this statement, and not from the Second Circuit's holding. The court concluded that the primary use of the plaza outside the performing arts center was specifically related to the use of Lincoln Center as a performing arts complex and was not

created primarily to operate as a public artery. *Id.* at 552. The court specifically distinguished cases like this one involving downtown streets and sidewalks that serve their traditional purposes. *Id.* at 550 (noting that Lincoln Center Plaza "does not form part of the city's transportation grid in the way that traditional streets and sidewalks do.").

As the petitioners correctly point out, the Ninth Circuit went to some length to explain its view that placing too much emphasis on the property's "primary function and purpose" might in some cases lead to the result that properties which otherwise have the objective attributes of a public forum (and are fully compatible with expressive activity) could be removed or excluded from public forum status. App. 20a-22a. In explaining its concern on this point, the court stated that it has frequently been observed that the "notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction." *Id.* (quoting *ISKCON,* 505 U.S. at 696 (Kennedy, J., concurring)); *see also Warren*, 196 F.3d at 195 ("The primary purpose for which a particular piece of property was created is not dispositive. One cannot seriously argue with Justice Kennedy's observation that the traditional public fora of streets, sidewalks, and parks are not primarily designed for expressive purposes.").

The important point for purposes of the asserted conflict is that whatever tension exists in the approaches taken by the two courts – if any – is both minor and theoretical. The Ninth Circuit decision in fact focused on the actual use and purpose of the property as a pedestrian thoroughfare. App. 20a. Indeed, the petitioners conceded that the use of the property as a public thoroughfare is frequently dispositive and, therefore, such property meets "the classic definition of a public forum." App. 20a. In the final analysis, the distinction urged by the petitioners is no distinction at all with respect to the holdings in the two cases. Nothing in those cases remotely bring the circuits into

conflict over the holdings in the Fremont Street and Lincoln Center cases.

Applying this Court's well-established public forum law, the Second Circuit held in *Hotel Employees* that the plaza in front of Lincoln Center is not a public forum because it was not designed to serve as a public thoroughfare. 311 F.3d at 550-52. Applying the same legal principles, the Ninth Circuit similarly held that Fremont Street is a public forum because its primary use and function as a public thoroughfare and character as a commercial street had not changed. It is hardly surprising, therefore, and more legally relevant, that the Second Circuit easily distinguished cases like this one when it decided the case. *Id.* (comparing *First Unitarian*, 308 F.3d at 1114). In that case, the Tenth Circuit held that a portion of "Main Street" sold to a private party and converted into a pedestrian plaza remained a traditional public forum because, by retaining an easement for public passage over the property, the city intended to encourage pedestrian traffic and to preserve and enhance the downtown pedestrian grid. 308 F.3d at 1125-27. These distinguishing attributes, of course, perfectly define this case. Hence, what the petitioners describe as a conflict is simply a reflection of the fact that the same principle applied to different factual circumstances will often lead to different results. The petitioners must show more than that to justify a grant of certiorari.

Unlike Lincoln Center, the property in dispute here involves streets and sidewalks that were undisputedly a public forum prior to their transformation into a pedestrian mall. The enabling legislation and the agreement with the FSELLC both require that the street mall allow unobstructed pedestrian access. Fremont Street remains downtown's busiest commercial street and serves as the main axis in the city's transportation grid. By contrast, the Second Circuit concluded in *Hotel Employees* that the plaza outside Lincoln Center performs a different function. As emphasized in the

last section, whether one agrees or disagrees with that conclusion, it formed the basis for the court's holding and nothing in the decision suggests any disagreement with the Ninth Circuit's holding that streets and sidewalks that continue their historic function as a main public thoroughfare should continue to be treated as a public forum for First Amendment purposes.

In an effort to create a conflict, the petitioners emphasize their own version of the facts, but their recitation is both incomplete and misleading. There can be no doubt that the Lincoln Center case turned on a number of limiting factors conspicuously absent from any mention in the petitioners' brief, including most importantly the fact that the plaza forecourt "does not form part of the City's transportation grid in the way that traditional streets and sidewalks do." 311 F.3d at 550. The Second Circuit also observed that the ability of pedestrians to cross the plaza as a "shortcut between surrounding streets is merely an incidental feature of its principal function as the entrance plaza for the Lincoln Center complex." *Id.* As the Second Circuit itself pointed out, these facts were critical to its decision and, in its view, clearly distinguished Lincoln Center from the *First Unitarian Church* decision decided on almost identical facts as this one. *Id.; compare Hawkins*, 170 F.3d at 1287 (10th Cir. 1999) ("The Galleria does not form part of Denver's automotive, bicycle or pedestrian transportation grid, for it is closed to vehicles and pedestrians generally do not use it as a throughway to another destination. Rather, the Galleria's function is simply to permit ingress to and egress from the DPAC's various complexes").[9]

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[9] An examination of the factors relied upon by the Second Circuit actually belies petitioners' argument that there is a conflict between the circuits. Discussing Lincoln Center Plaza's location, function and purpose, the Second Circuit specifically distinguished the plaza from the sidewalks under consideration in this case:

The distinguishing factors present in this case cited by the Second Circuit panel are not casual or accidental invocations. They go to the very heart of the public forum analysis. The actual purpose and use of the mall in this case is a pedestrian thoroughfare. This is not merely the use the City has in practice permitted, but is in fact the expressed purpose for which the mall was created. The City's stated objectives for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a venue closed to automobile traffic. While the City wanted to close the street to automobile traffic, it simultaneously wanted to preserve and indeed encourage pedestrian traffic. Unlike the forecourt at Lincoln Center, the mall was neither established nor functions solely for ingress and egress to the abutting properties. The petitioners' attempt to draw a parallel to the description of how the forecourt at Lincoln Center functions is at odds with the findings in this case. Fremont Street does more than provide access to those with casino business.

In view of the obvious factual differences between how Lincoln Center and Fremont Street function, the petitioners' argument that there is a conflict is incorrect. Their contention is further undermined by the fact that the

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> Thus, it is apparent that the Plaza's primary function and purpose is to serve as a pleasing forecourt at the center of a prominent performing arts complex, to facilitate patrons' passage into the events taking place in the arts buildings, and symbolically to promote the cultural arts for the benefit of the community. Although the Plaza's design clearly invites passers-by to stroll through or linger, the Plaza was not created primarily to operate as a public artery, nor to provide an open forum for all forms of public expression.

311 F.3d at 551-52. Only by ignoring the critical factual differences between these two cases can Petitioners argue that there is actually a conflict between the Second and Ninth Circuits.

Second Circuit specifically discussed and distinguished cases involving downtown streets and sidewalks, thus rejecting the claimed conflict on which the petitioners now rely.

IV. THE NINTH CIRCUIT DECISION DOES NOT UNDULY INTERFERE WITH GOVERNMENTAL DISCRETION ABOUT HOW TO MANAGE ITS PROPERTY

According to the petitioners, the Ninth Circuit's decision unduly interferes with governmental discretion over how to best use publicly owned property and impedes their redevelopment efforts. Following the lead of the Tenth Circuit, the court below rejected that argument with the observation that

> "as society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda,* 497 U.S. 720, 737 (1990) (Kennedy, J., concurring in the judgment). We think this is particularly true with respect to downtown public spaces conducive to expressive activities.

App. 11a-12a (quoting *First Unitarian,* 308 F.3d at 1131). The petitioners take exception to the lower court's sensitivity to this issue and its conclusion that "[a]wareness of contemporary threats to speech must inform our jurisprudence regarding public forums." App. 12a. In effect, the petitioners are seeking a First Amendment exemption for today's "modern downtowns."

Moreover, a careful reading of the petitioners' brief reveals that they are asking this Court to decide the circumstances under which a public forum can be closed. But this case does not present an appropriate record to resolve that issue. Here, Fremont Street not only remains a

pedestrian street as defined by the enabling legislation and the agreement between the City and the FSELLC, but there is also a factual finding that the pedestrian mall in practice continues to fulfill its intended and historic function as a public thoroughfare. Even the petitioners have never claimed that this factual finding is clearly erroneous. The Court might someday want to consider a case in which the streets and sidewalks have been closed and the use of the venue changed to a different use, but that issue is not presented by these facts.

The petitioners' view is that the government always retains the authority to close a public forum by, among other things, selling the property. *See ISKCON,* 505 U.S. at 699-700. We have no quarrel with this general observation, but clearly it must be understood in the context of the overriding principle that the government cannot overcome that presumption by mere fiat: the government "must alter the objective physical character or physical uses of the property, and bear the attendant costs." *Id.* at 700. Neither the fact that the City has entered into an operating agreement with the FSELLC nor the fact that the sidewalks no longer look like traditional curb and gutter sidewalks negates the public forum status of municipal sidewalks under circumstances where, as here, they continue to have the essential form and function of municipal sidewalks by design and by statute.

Although the addition of the canopy covering a portion of the street mall distinguishes the Fremont Street Mall from other pedestrian malls elsewhere, there has been no fundamental alteration in the objective physical characteristics or uses of the property as a busy commercial street located in the heart the downtown gaming district. It is also true that the sidewalks on Fremont Street do not resemble traditional curb and gutter sidewalks. Nevertheless, Fremont Street remains open to the elements, is integrated with the other streets that cross and surround it, and continues to serve as a pedestrian throughway for

downtown commuters, shoppers, and visitors. The Fremont Street Mall functions like pedestrian malls in other cities. Any difference in physical design is essentially a question of degree. In addition to the hotel-casinos and other businesses that have historically anchored Fremont Street, city officials have taken steps to ensure the comfort of visitors by adding attractions typically found in city parks such as benches, eating areas, and pushcart food and souvenir vendors. To the extent the sidewalks provide access to the hotel casinos, the former streets and sidewalks did the same. Similarly, to the extent that the new Fremont Street is designed to appeal to tourists and fill those casinos, the old historic Fremont Street (also known as "glitter gulch") performed the same function.

There is no compelling reason for the Court to grant certiorari in order to resolve the circumstances under which a city may change the forum status of its downtown streets and sidewalks. Respondents do not understand the lower courts to have struggled with this issue and see no evidence of a conflict in the courts of appeals. Nor have the petitioners cited any cases to suggest that such a conflict exists. More importantly, this case does not clearly present that issue, as the petitioners are statutorily required to keep the mall open for unobstructed pedestrian use.

V. THE NINTH CIRCUIT DECISION DOES NOT REPRESENT AN EXPANSION OF PUBLIC FORUM DOCTRINE

The petitioners greatly exaggerate the legal significance of the issues in this case and attempt to draw the Court into an abstract dispute about the "expansion" of First Amendment forum doctrine and its potential to interfere with urban redevelopment. The decision in this case poses no more a threat to the petitioners' asserted interests than other constitutional limitations that cabin their discretion. It simply ensures that municipalities do not surrender the public's First Amendment rights even for other public

benefits such as urban renewal. Every redevelopment project certainly will not involve a public forum. This case, however, involves the main downtown street of the City of Las Vegas. Therefore, whereas downtown projects involving municipal arenas, sport stadiums, or performing art centers may raise different considerations and interesting legal questions, this case involves none of those properties.

What the petitioners are really asking the Court to do is to analyze this case divorced from the fact that Fremont Street's actual use and function is still that of a street. The petitioners seek to distance themselves completely from any constitutional requirements that flow from the property's status as a street. But expressive activities have been historically compatible with, if not virtually inherent in, property dedicated as streets and sidewalks. The court below correctly rejected the petitioners' attempt to sidestep the constitutional obligations that flow from the operation of streets and sidewalks.

The petitioners cannot have it both ways. Having chosen to maintain Fremont Street's status and function as a commercial street, the City cannot now walk away from its constitutional obligations simply because the new Fremont Street has a different design than the old Fremont Street. Holding the petitioners to constitutional requirements under the circumstances present in this case is hardly controversial. The decision below does not break new ground, nor does it present the grave danger to the interests that the petitioners assert. Contrary to the petitioners' claim, the right to assemble and communicate in such places may not be abridged or denied regardless of the government's intent to change the status of the property or to protect the investment-backed expectations of its private partners.

CONCLUSION

For the reasons states above, the writ of certiorari should be denied.

Respectfully Submitted,

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Dated: December 15, 2003

APPENDIX A

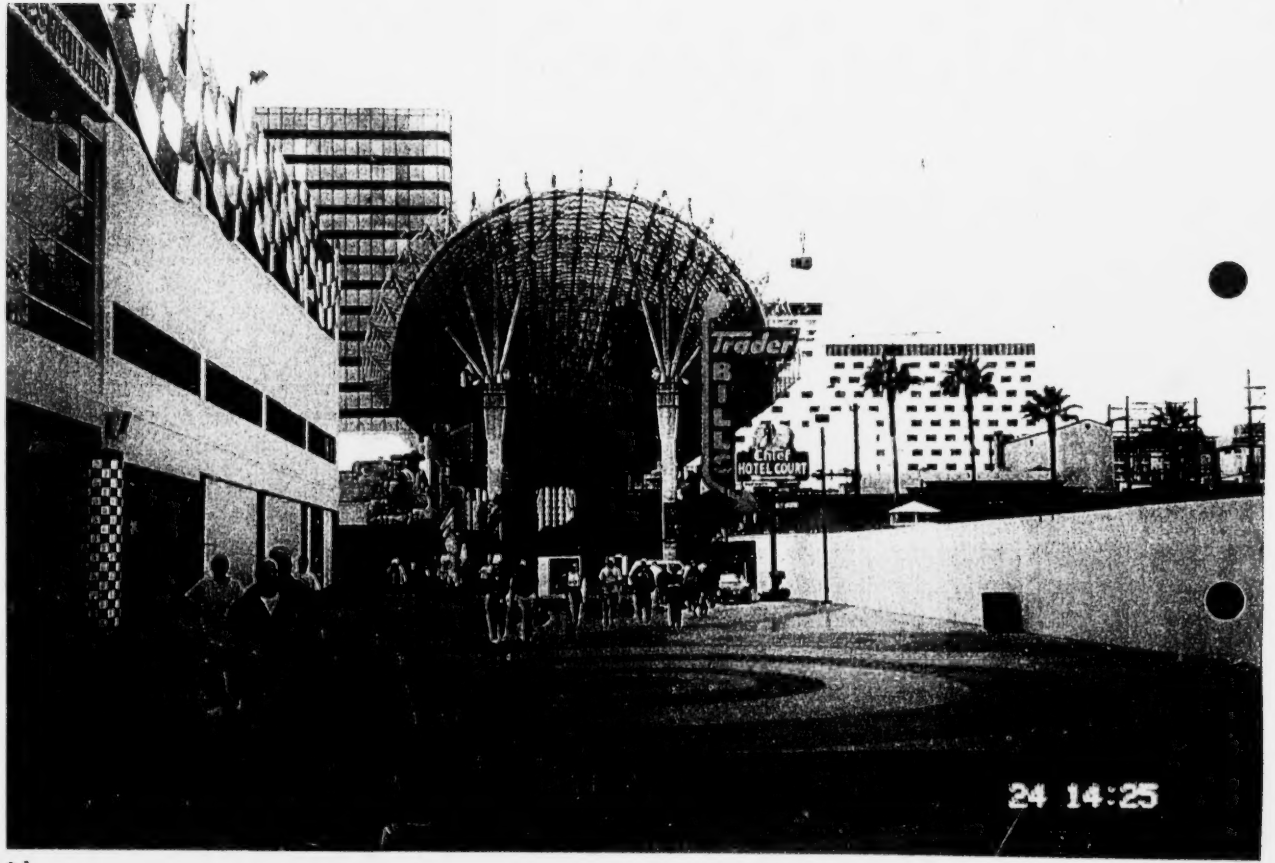
Photographs From the Court Below

25 15:18

Famous
PIONEER
14
24 17:24

Pizza Hut
1912
TRADER BILL'S
JEWELRY
OUTPOST
HARLEY-DAVIDSON

226



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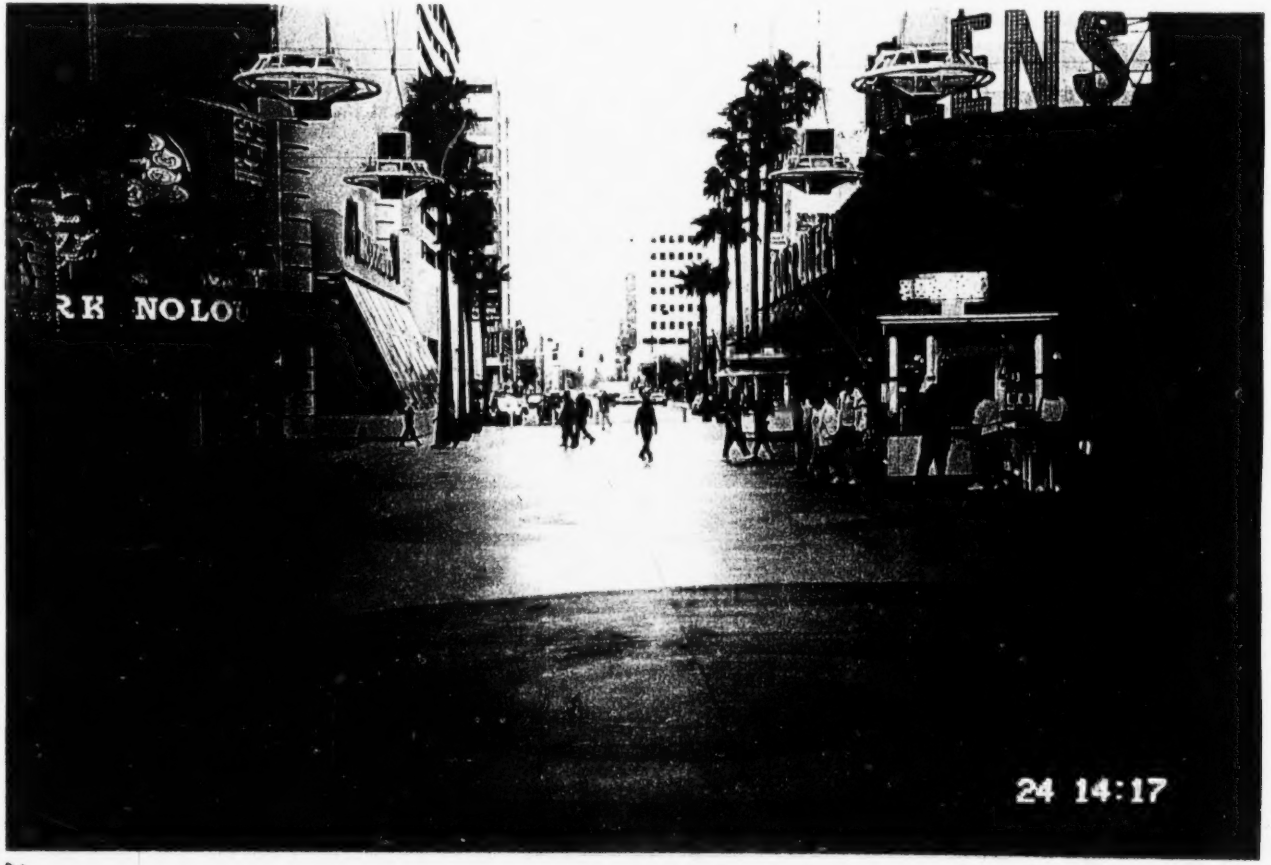
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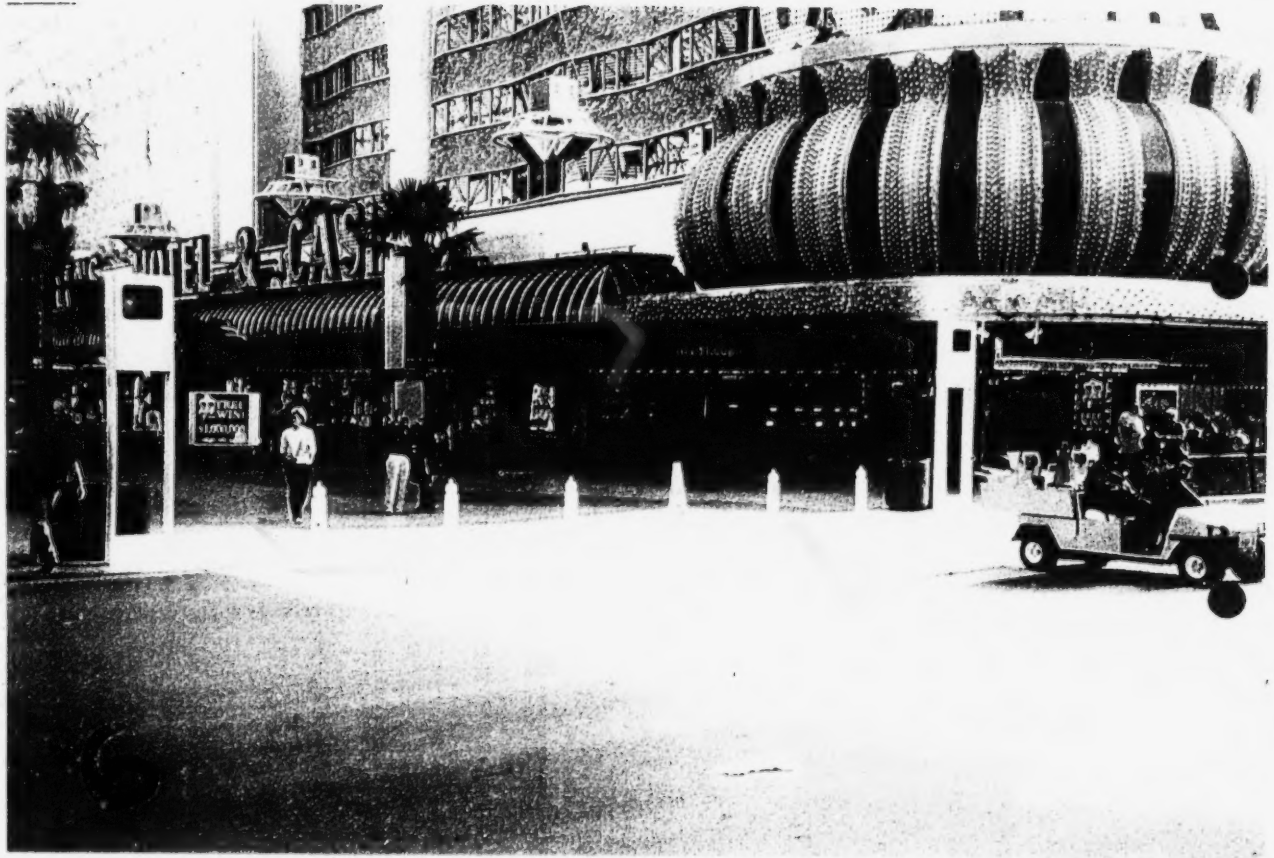

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Plaza
HOTEL
CASINO
SUB
SUB
Party